17-591

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1152.

THE UNION TRUST COMPANY OF NEW YORK, APPELLANT,

vs.

E. E. SOUTHER & BROTHER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 8, 1882.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, associate judge, on Tuesday the nineteenth day of September, in the June term of said court, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

J. A. JONES, Clerk.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY, Willis Caubie, and Henry Holbrook.
In chancery.

SOUTHERN DISTRICT OF ILLINOIS, ss:

Be it remembered that on the sixth day of December, A. D. 1877, came said complainant by Messrs. Judah and Whitehouse and Wheeler H. Peckham, its solicitors, and filed in the clerk's office of said court its bill of complaint herein in the words & figures following, to wit:

2 In the circuit court of the United States for the southern district of Illinois, in equity.

To the honorable the judges of the circuit court of the United States for the southern district of Illinois, in the seventh circuit, sitting in equity:

The Union Trust Company of New York, a citizen of the State of New York, brings this its bill of complaint against the Cairo and St. Louis Railroad Company, a corporation organized and existing under the laws of the State of Illinois and a citizen of the State of Illinois, and thereupon your orator complains and says—

3 First. That at the times hereinafter mentioned your orator was and now is a corporation duly created by, organized, and existing under and by virtue of the laws of the State of New York, having its place of business in the city and State of New York, and that it is a citizen of the State of New York; that at the times hereinafter mentioned the defendant The Cairo and Saint Louis Railroad Company was and now is a railroad corporation created by and organized and existing under and by virtue of the laws of the State of Illinois, and is a citizen of said State of Illinois.

Second. That on or about the second day of October, eighteen hundred and seventy-one, the said Cairo and Saint Louis Railroad Company, for the better securing the payment of certain bonds, to be issued by said Cairo and Saint Louis Railroad Company, and for other good and valuable considerations, duly executed under its corporate seal and delivered to your orator its certain mortgage or deed of trust, bearing date on that day, wherein and whereby the said Cairo and Saint Louis Railroad Company granted, bargained, sold, conveyed, and transferred unto your orator and to your orators' successors and assigns forever all and singular the rail-

road of the said Cairo and Saint Louis Railroad Company, or which the said Cairo and Saint Louis Railroad Company was by law authorized to construct, known or to be known as the Cairo and Saint Louis
4 Railroad, extending and to be constructed from the city of Cairo, in Alexander County, Illinois, to the city of East St. Louis or Illinois town, in St. Clair County in said State, being a distance of one hundred and forty-seven miles, more or less; and also all rolling stock, equipment, and machinery connected or to be connected with said railroad, and all property rights and franchises held or thereafter to be acquired by the said Cairo and Saint Louis Railroad Company, its successors or assigns, including all the railways, ways, and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine shops and other shops held or acquired or which should be held or acquired for use in connection with the said railroad or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight, and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing the said railroad, or the equipments or appurtenances of the said railroad, held or thereafter to be acquired by the said Cairo and Saint Louis Railroad
5 Company, and including also all the franchises of the said Cairo and Saint Louis Railroad Company, connected with or relating to the said railroad, or to the construction, maintenance, or use thereof, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad and premises or any part thereof belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possessions, claim, and demand whatsoever as well in law as in equity of the said Cairo and Saint Louis Railroad Company of, in, and to the same, and any and every part and parcel thereof with the appurtenances, and also all books of account and vouchers kept and to be kept by the said Cairo and Saint Louis Railroad Company, and all other property whatsoever which the said Cairo and Saint Louis Railroad Company held or should thereafter acquire; to have and to hold the said railroad lands and premises, and all the franchises and property hereinbefore described unto your orator and your orator's successors and assigns, in trust for the uses and purposes, and with and subject to the power, agreements, and conditions thereinafter and hereinafter mentioned and set forth.

6 That in and by said mortgage it was recited that the said Cairo and Saint Louis Railroad Company was a corporation duly formed and organized under the laws of the State of Illinois for the purpose of constructing, operating, and maintaining a certain railroad to be constructed from East Saint Louis, or Illinoistown, to Cairo, in the State of Illinois; and that to procure the means necessary to construct and equip the said railroad, the said Cairo and Saint Louis Railroad Company had determined, pursuant to the powers and authorities in it duly vested, to issue and to offer for sale, and negotiate a series of two thousand five hundred bonds of one thousand dollars each, bearing date on the second day of October, in the year of

our Lord eighteen hundred and seventy-one, and payable thirty years from date, in gold coin of the United States of America, at the city of New York, or, in British pounds sterling, at the city of London, in England.

That the form of said bonds was and is set forth in said mortgage, and that it was therein provided that if default should be made in the payment of any half yearly instalment of interest on the same when
7 such instalment of interest should become due and be demanded, and such instalment of interest should remain due and in arrear for the period of six months, the principal of said bond, as well as the principal of each of the bonds of the series of which said bond was one, could and might be declared and made to become due and payable immediately, in the manner and with the effect provided and declared in the said mortgage or deed of trust, as thereinafter and hereinafter mentioned, notwithstanding that the time in each of said bonds limited for the payment thereof should not then have elapsed.

That it was further provided in and by said mortgage that none of said bonds should become valid or obligatory until the certificate authenticating the same, and which was endorsed thereon, should be duly signed by the president or other duly authorized officer of your orator.

That it was further provided in and by said mortgage that all of said bonds should have annexed thereto coupons or interest warrants for the payment of the interest from time to time, according to the form in said deed set forth.

That it was further provided in and by said mortgage that
8 said Cairo and Saint Louis Railroad Company should and would, on or before the first day of May, in the year of our Lord one thousand eight hundred and seventy-three, pay over to your orator, or to the then trustee under said mortgage, the sum of twelve thousand five hundred dollars, as, and for the first instalment of a sinking fund for the redemption and cancellation of said bonds; and that the said defendant railroad company should, and would, semi-annually thereafter, namely, on or before the first days of May and November in each year, until the said bonds should become due and payable, or have been all redeemed, pay over to your orator, or the then trustee under said mortgage, the like sum of twelve thousand and five hundred dollars and in addition thereto a further sum equal to six months' interest upon the aggregate amount of bonds which up to the time of such payment should have been redeemed through the said sinking fund, so that although the bonds redeemed should be cancelled the said sinking fund should be semi-annually augmented by an amount equivalent to the interest which would be due thereon if the said bonds had remained in force.

That said mortgage contained full and appropriate provisions for the purchase and redemption of said bonds by your orator out of said
9 sinking fund as aforesaid, and for the cancellation and delivery to the said railroad company of all bonds so purchased as aforesaid.

That it was further provided in and by said mortgage that until the said Cairo and Saint Louis Railroad Company should make in the payment of interest on said bonds, or in the payment of the sinking fund therein created as aforesaid, or in the due observance of the covenants and agreements thereinafter and hereinafter contained, or in the payment of the

principal of said bonds, the said defendant railroad company should be suffered and permitted to remain in the actual possession of the said railroad and premises, and to exercise the franchises and rights relating thereto, and to collect, receive, and use the tolls, incomes, revenues, rents, issues, and profits thereof in any manner which would not impair the lien created by said mortgage.

That the said defendant railroad company in and by said mortgage covenanted, promised, and agreed to and with your orator and its successors in the trust thereby created that the said defendant railroad company should and would diligently and faithfully use and apply the net proceeds of the negotiation of said bonds in and to the construction of said railroad, and, remaining in the possession of the said railroad and premises, should
10 and would keep the said railroad in good order and safe-running condition, and should and would from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the said railroad and premises, or upon any part thereof, the lien of which might or could be held prior to the lien of said mortgage, so that the priority of said ortgage might be duly preserved, and that the said defendant railroad company should not and would not do or suffer any act or thing whatsoever whereby the lien of said mortgage might or could be impaired until the said bonds and all interest thereon should be fully paid and satisfied.

It was further in said mortgage provided that in case the said defendant railroad company should well and truly pay the principal of each of said bonds when the same should become due, according to *the* their tenor and effect, and all interest upon the said bonds when the same should become due, and all instalments into and for the purposes of the sinking fund aforesaid, then all the estate, right, title, and interest of your orator and your orator's successors in the trust under said mortgage should cease, determine, and become void; otherwise the same should remain in full force and virtue.

11 That it was further provided in said mortgage that in case default should be made in the payment of any semi-annual instalment of interest which might accrue upon the said bonds or any of them, when such interest should become due and be demanded, and such interest or any part thereof should remain unpaid and in arrear for the period of three months, or in case default should be made in the payment of any instalment of the money provided to be paid to your orator as a sinking fund for the purchase or redemption of said bonds as aforesaid, and such default should continue for six months, or in case default should be made in the due observance and performance of the covenant of further assurance thereinafter and hereinafter set forth, or in case default should be made in the payment of any taxes, assessments, or other governmental charges which might be lawfully levied or imposed upon the said ailroad and premises, or any part thereof, and the lien whereof might or could be held prior to the lien of said mortgage and said two last mentioned defaults should continue for one year, or in case the default should be made in the payment of the principal of said bonds, or of any one of them, then and
12 *and* in any and every such case of default it should be lawful for your orator, as such trustee, by its duly authorized officer, attorney, or agent, to enter into and upon the railroad and premises in said mortgage

granted or conveyed, and each and every part of the same, and from thenceforth to hold, possess, and enjoy the said railroad and premises, and each and every part thereof, and all and singular the rights and franchises granted as aforesaid, and to operate the said railroad by such superintendents, managers, receivers, assistants, and *and* servants, or other attorneys or agents, as your orator should deem proper, and to make from time to time all such repairs and replacements, and all such useful alterations, additions, and improvements to the said railroad and premises as your orator might deem expedient and judicious, and likewise that it should be lawful for your orator after that any and every default had happened and continued as aforesaid to collect and receive all tolls, fares, freights, rents, revenues, incomes, issues, and profits of the said railroad and premises, and of every part and parcel thereof, and after deducting therefrom all the expenses lawfully incurred in making such entry, or in otherwise obtaining possession of said premises, including reasonable attorney and
13 counsel fees and any and all expenses of holding, operating, and managing the said railroad and premises and conducting the business thereof, including the cost and expense of all such repairs, replacements, alterations, additions, and improvements as might be made by your orator as aforesaid, and all payments which might be made or be due for taxes and assessments or other charges or liens prior to the lien of said mortgage upon the said railroad and premises, or upon any part thereof, and just compensation for your orator's own services, to apply the residue of any and all tolls, incomes, rents, revenues, issues, and profits of the said railroad and premises which might be received by it as aforesaid, first, to the payment of all overdue interest on said bonds, with interest thereon, and secondly, to the payment of all interest accruing during such possession by your orator, and that such payments of interest should be made to the holders of the bonds and coupons evidencing the right to the same ratably and without discrimination or preference between them, and that in case, in any six months of such possession of your orator, there should remain
14 a surplus of money arising from said railroad and premises as aforesaid, after the payment of all interest on said bonds, that the same should be applied in and to the purposes of said sinking fund as aforesaid.

That it was further provided in and by said mortagage that in case of such defaults for the respective periods aforesaid in the payment of interest on any of said bonds or in the payment of any instalment for the purposes of the said sinking fund or in the payment of the principal of any of said bonds, then it should likewise be lawful for your orator, as trustee as aforesaid, after entry upon the said premises as aforesaid, or without any entry thereon, to sell and dispose of, by its duly authorized attorney or agent, all and singular the railroad and property and the rights and franchises granted or conveyed as aforesaid which shall then be or remain subject to the lien or operation of said mortgage at public auction, in the city of New York, or in either of the cities of Cairo or St. Louis, or in any county in Illinois through which the said railroad might run, and which your orator might, in its discretion, designate and at
15 such time as your orator should appoint; that preparatory to such sale your orator should give public notice of the time and place when and where the same was to be made by advertisment thereof, published in two newspapers in the city of New York, and also in one news-

paper in each of the cities of Cairo and St. Louis, at least three times a week for six successive weeks, and that it should be lawful for your orator to make and deliver to any purchaser or purchasers at such sale good and sufficient deed or deeds in the law of and for the railroad and property so sold as aforesaid, and that after deducting from the proceeds of such sale just allowances for all expenses connected therewith, including attorney and counsel fees, and any and all advances, expenses, and liabilities that may have been made or incurred by your orator in operating or maintaining the said railroad, or in managing the business thereof, while the same should have been in your orator's possession, or in arranging for, making, or completing the sale aforesaid, and also all payments that may have been made by your orator for taxes and assessments or other charges or liens prior to the lien of said mortgage, if any such there should be, and just and reasonable compensation for
16 your orator's own services, your orator should apply the *the* purchase money and proceeds of such sale to the payment of the principal of such of the said bonds as might be at that time outstanding and unpaid, whether or not such principal thereof should have by the terms of said bonds previously become due, and of the interest which should have accrued upon the said principal up to that time and be unpaid, with interest thereon, if the same be overdue, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such unpaid principal and accrued *and accrued* and unpaid interest; and that it was understood, and in said mortgage declared and agreed, that upon any sale of said premises that might be made as aforesaid, or upon any sale thereof that might be made under or by virtue of the judgment or decree of any court of competent jurisdiction rendered in any suit or proceeding for the enforcement or foreclosure of the lien created by said mortgage, the principal of all the bonds aforesaid should become and be immediately due and payable, and that such payment should be made to the persons holding the bonds and coupons, evidencing the right to such principal and interest without discrimination or preference between them on account of the time of
17 the actual issue of said bonds; and that in case, after payment in full of all the same bonds, principal and interest, including the interest on overdue coupons, a surplus of the said proceeds of sale should remain, that your orator should pay over such surplus to the said Cairo and St. Louis Railroad Company, its successors or assigns, or as any court of competent jurisdiction should lawfully direct.

That it was in said mortgage further declared and agreed that your orator might adjourn said sale by announcement, made at the time and place appointed for such sale, and if such sale should be adjourned and without further notice thereof, that the receipt of your orator should be a sufficient discharge to the purchaser or purchasers of the property so sold as aforesaid for his or their purchase money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, should not after paying such purchase money, and receiving such receipt, be liable to see to the application of such purchase money upon or for the trusts or purposes of said mortgage, or be in any manner answerable for any loss, misapplication, or non-application of such purchase money or of any part thereof;
18 that in case of default as aforesaid, the said Cairo and Saint Louis

Railroad Company should waive, and that said railroad company, in and by said mortgage, did waive, the benefit of any and all existing extension, stay, and appraisement laws, or which should be thereafter enacted; and that any sale made as aforesaid should be a perpetual bar, both in law and in equity, against the said defendant railroad company, its successors and assigns, and any and all persons whomsoever claiming or to claim the railroad or other property so sold, or any part thereof, by, from, through, or under the said defendant railroad company, or its successors or assigns.

That it was in and by said mortgage further provided and mutually agreed by and between the parties thereto that at any public sale of the railroad property therein conveyed, made by virtue of the power therein granted as aforesaid, or by judicial authority, for the purpose of enforcing the lien of said mortgage, your orator might in its discretion, and not otherwise, bid a sum not exceeding the whole amount of said then outstanding bonds, with the interest accrued thereon, and the expenses of such
19 sale for the entire property thus held upon the trusts of said mortgage or at an amount reasonably proportionate thereto for any part of the said property, and purchase and acquire the property so offered for sale, in behalf of all the holders of the then outstanding bonds secured by said mortgage, in proportion to the amount of said bonds, and of the overdue coupons theunto belonging by them respectively held; and that the bonds and overdue coupons aforesaid should be received in payment of the purchase money of any property sold as aforesaid, as equivalent to so much of the said purchase money as would be distributable and payable thereon.

That it was further provided in and by said mortgage that in case default should be made in the payment of any semi-annual instalment of interest to accrue on any of said bonds when such interest should become payable, and such interest should remain unpaid and in arrear for the space of six months then in each and every such case of the happening and continuing of such default in the payment of interest, the principal of each and all of the said bonds might be declared by your orator
20 at its option to be and thereupon the same should become due and payable immediately, notwithstanding that the time limited therein for the payment thereof might not then have elapsed, and that said declaration should be made by an instrument in writing, under seal, duly served on said defendant railroad company.

That it was in and by said mortgage provided that no act or omission of your orator in respect to any default in the payment of interest which might have happened should be held to exhaust or impair your orator's said option, or to extend to or affect any subsequent default or impair the rights which would otherwise arise therefrom.

That it was further expressly declared and agreed in and by said mortgage that in case default should be made in the payment of interest upon any of the said bonds when such interest should become payable and be demanded, or in case default should be made in the payment of any instalment of the sinking fund hereinbefore set forth, and if such default should continue for the space of six months, or in case default should be made in the payment of the principal of any of the said bonds when the
21 same should become due, then, in either and every such case of de-

fault, it should be the duty of your orator to exercise the powers of entry and sale hereinbefore set forth, or to take appropriate legal proceedings to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon your orator, signed by the holders of at least five hundred thousand dollars in amount of the said bonds.

That it was further provided in and by said mortgage that your orator should at all times during the continuance of the trust created by said mortgage have full power and authority to be exercised in your orator's discretion, and not otherwise, to grant and convey to any party who might be designated in writing by the said defendant railroad company, its successors or assigns, or to release from the lien or operation of said mortgage in such other manner as your orator might deem proper any portion of the premises in said mortgage granted which might have been held for use in connection with the said railroad, but which in the judgment of
22 your orator should have become unnecessary or unadapted for use in connection therewith, and which should have been acquired or held for stations, depots, shops, or other buildings, or for supplying fuel, gravel, or other material; and also to convey or release as aforesaid on like request any lands not occupied by the track which might become disused by reason of a change in the location of any station-house, depot, shop, or other building connected with the said railroad, and such lands occupied by the track and adjacent to such station-house, shop, or other building as the said defendant railroad company, its successors or assigns, might deem it expedient to disuse or abandon by reason of such change; and that your orator might consent to any changes in the location of any depot, shop, or other building which in your orator's judgment should have become expedient, and make and deliver the instruments necessary or proper to carry the same into effect; and that any and all lands and premises which should be acquired for permanent use in substitution for any so released should be conveyed to your orator upon the trusts
23 of said mortgage; and that your orator should have full power to allow the said defendant railroad company, its successors or assigns, from time to time, and according to its or their discretion, to dispose of such portion of the equipment, machinery, and implements at any time held or acquired for the use of said railroad as should have become unfit for such use; but that any and all new or other equipment, machinery, or implements which might be acquired in substitution for any so released should, by virtue and force of said mortgage, become and be, immediately upon the acquisition of the same, subject to the lien and operation of said mortgage without any new conveyance or transfer or other act or ceremony whatever.

That it was in said mortgage mutually agreed by and between the parties thereto, and therein provided, that your orator should be entitled to just and reasonable compensation for all services which might be rendered by your orator in said trust, to be paid by the said defendant railroad company or out of the income of the property; and that your orator should not
24 be answerable for the fault or misconduct of any agent or attorney who might be appointed by it pursuant to said mortgage, if such agent or attorney should be selected with reasonable care, or for anything whatsoever in connection with said trust except wilful misconduct or gross negligence.

That in and by said mortgage the said defendant railroad company, for the consideration aforesaid, covenanted, promised, and agreed to and with your orator and its successors in the trust thereby created that the said railroad company, its successors and assigns, should and would well and truly pay, or cause to be paid, unto the holder or holders of said bonds the principal and interest thereof, as the same should become payable according to the tenor of said bonds and the terms of the coupons thereto annexed, and should and would do, observe, and perform any and every act and thing mentioned in and required by said mortgage to be by said railroad company or its successors or assigns done, observed, and performed; and that the said railroad company should and would, from time to time, and at all times thereafter, and as often as
25 thereunto requested by your orator, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law for the better assuring unto your orator, its successors in said trust, upon the trusts therein expressed, the railroad aforesaid, with its appurtenances and the rolling stock, equipment, machinery, franchises, property, and things aforesaid, and particularly any and all property, rights, and franchises whatsoever which should or might at any time thereafter, while the said bonds or any of them remain unpaid, be acquired by the said defendant railroad company, its successors or assigns, as your orator or its counsel learned in the law should reasonably advise, devise, or require.

That said mortgage was duly recorded in the offices of the proper officer in each of the counties in said State of Illinois where any of the said mortgaged property was or is situate, a copy of which mortgage is hereto attached, marked Exhibit A. Said mortgage or deed of trust was recorded in the recorder's offices of the following-named counties, at the dates named, as follows, viz: in St. Clair County February 26th, 1872,
26 in the county of Monroe February 22nd, 1872; in the county of Randolph February 23rd, 1872; in the county of Jackson February 24th, 1872; in the county of Union February 24th, 1872; in the county of Alexander February 26th, 1872; in the county of Perry May 10th, 1873.

Third. Your orator further shows that the said Cairo and Saint Louis Railroad Company, on or about, and bearing date upon the same second day of October, 1871, under and pursuant to said mortgage, duly executed under its corporate seal and delivered to your orator its certain two thousand five hundred bonds of the denomination of one thousand dollars each, in and by each of which the said defendant railroad company acknowledged itself indebted to your orator or bearer in the sum of one thousand dollars gold coin of the United States of America, and promised to pay the same to your orator, or to the bearer thereof, on the second day of October, one thousand nine hundred and one, in gold coin of the United States, at the office of your orator, in the city of New York, or in
27 British pounds sterling, at the rate of four British shillings per dollar, at the agency of the said railroad company in the city of London, England, at the option of the holder thereof, with interest on said principal sum at the rate of seven per centum per annum, payable semi-annually, on the first day of April and the first day of October, in each year, at the office of your orator, in the city of New York, in gold coin of the United States, or at the agency of said railroad company in

the city of London, England, in British pounds sterling, at the rate of four British shillings per dollar, at the option of the holder, upon presentation and surrender of the annexed coupons as they severally became due; and that such payment of interest should in all cases be made without deduction or abatement on account of any income or other tax imposed or to be imposed by the Government of the United States, or any law thereof, which the said company might lawfully deduct from such interest to pay over to any officer of said government, and that such taxes should be paid by said railroad company, in addition to such interest. That in case of the non-payment of the interest for any half-year, when due and
28 demanded, and the same remaining unpaid for six months, that the principal of said bond, and of each of said bonds could and might be declared and made to become due and payable immediately in the manner and with the effect provided and declared in said mortgage and as hereinbefore set forth, notwithstanding that the time limited for the payment thereof had not then elapsed.

It was also stated in each of said bonds that the same was one of a series of two thousand five hundred bonds of like tenor and date, numbered from one to two thousand five hundred inclusively, and amounting in the aggregate to two million five hundred thousand dollars and that the payment of the same was secured by a certain deed of trust or mortgage bearing even date with said bond made by the Cairo and Saint Louis Railroad Company to your orator as trustee, conveying to your orator the Cairo and Saint Louis Railroad, extending and to be constructed from East St. Louis or Illinoistown, in the State of Illinois, a distance of one
29 hundred and forty-seven miles, together with the equipments and appurtenances of said railroad and all other property, rights, and franchises held and to be acquired by said railroad company, and that said trust deed provided for a sinking fund for the redemption of said bonds.

Each of said bonds contained a further provision for the registry thereof in the name of the holder thereof, and for the retransfer to bearer, and that while so registered in the name of the holder it should be transferable only on the books of the company, but after being transferred to bearer it should pass by delivery as theretofore; and it was provided in each of said bonds that it should not become valid or obligatory until the certificate authenticating the same and endorsed thereon should be duly signed by the president or other duly authorized officer of your orator.

That to each of said bonds coupons or interest warrants were attached for each instalment of interest, in and by which the said defendant railroad company promised to pay to the bearer the sum of thirty-five dollars or seven pounds sterling.

30 That your orator duly certified under the signature of its president, or other duly authorized officer, and delivered to said defendant railroad company all of the said two thousand five hundred bonds, and that the same have been duly sold and delivered to bona fide owners and purchasers thereof, and that the same are now outstanding in the hands of divers persons to your orator in great part unknown, bona fide owners and holders thereof and entitled to the security of said mortgage so executed to your orator as aforesaid.

Fourth. Your orator further shows that the said Cairo and Saint Louis Railroad Company has made default in the conditions of said mortgage and of said bonds.

That the said Cairo and Saint Louis Railroad Company, did not, on or about the first day of May, eighteen hundred and seventy-three, nor semi-annually on the first days of May and November in each year thereafter, nor at any time, or at all, pay to your orator, as such trustee or otherwise, the sum of twelve thousand five hundred dollars, or any sum whatever for the purpose of a sinking fund for the redemption and cancellation
31 of said bonds or otherwise, and that more than six months have elapsed since said default on the first day of May, eighteen hundred and seventy-three, and the said several and respective semi-annual defaults thereafter, up to and including this default on the first day of May, eighteen hundred and seventy-seven.

That on or about the first day of October, eighteen hundred and seventy-three, and semi-annually thereafter, to wit, on or about the first day of April, eighteen hundred and seventy-four, the first day of October, eighteen hundred and seventy-four, the first day of April, eighteen hundred and seventy-five, the first day of October, eighteen hundred and seventy-five, the first day of April, eighteen hundred and seventy-six, the first day of October, eighteen hundred and seventy-six, and the first day of April, eighteen hundred and seventy-seven, a large number of the coupons or interest warrants of said bonds, due and payable on said first day of October, eighteen hundred and seventy-three, and said several days, respectively, were duly presented to the said Cairo and Saint Louis Railroad Company at the office of your orator in the city of New York, and payment of said coupons due on said first day of
32 October, eighteen hundred and seventy-three, and on said several days, respectively, was duly demanded of said defendant railroad company, and was by said railroad company on said first day of October, eighteen hundred and seventy-three, and on said several days, respectively, refused.

That on said first day of October, eighteen hundred and seventy-three, and on said several days, respectively, the said defendant railroad company was insolvent and was unable to meet its obligations as they matured, and that said railroad company had made no provision and had no funds to pay the interest on said bonds on said first day of October, eighteen hundred and seventy-three, and on said several other days, respectively; that said default on said first day of October, eighteen hundred and seventy-three, and said several other defaults, respectively, have each continued for more than six months after the demand of such interest as aforesaid, and at the time of exhibiting this bill by your orator still continue.

Your orator further shows that since the expiration of said six
33 months after such default, on said first day of October, eighteen hundred and seventy-three, and said several other defaults, respectively, in the payment of such interest, after being so demanded as aforesaid, the holders of said bonds, in respect of which there has been such continuous default to an amount of five hundred thousand dollars of principal, in writing have requested your orator to enter into and take possession of the said railroad and all other property in said mortgage described, and to take appropriate legal proceedings to enforce the rights of the holders of said bonds and to sel' the said railroad as in said mortgage empowered, and to foreclose said mortgage, and that pursuant to such request and also of its own motion your orator files this bill of complaint.

Fifth. Your orator further shows that in consequence of the said several defaults in the payment of the semi-annual instal'ments of interest of said bonds and the continuance of said several defaults after demand of the same for six months as aforesaid, and pursuant to the provisions of said mortgage and to the power and authority in your orator therein and thereby duly vested and given, your orator has declared by an instrument
34 in writing and under the seal of your orator, the principal of each and all of said bonds to be due and payable immediately, and that the same is now due and payable, and that said declaration in writing has been duly served on the said defendant railroad company, and due service of the same has been admitted in writing by said defendant railroad company.

Sixth. Your orator further shows that the said defendant railroad company is insolvent; and that the property so mortgaged to your orator is insufficient in value to secure the payment of the said bonds; that the revenue of the said defendant railroad company is not sufficient to pay the interest on said bonds; that many and large claims exist against said railroad company of the character known as floating debt; and that unless a receiver is appointed by this honorable court, or the judges thereof, great, irreparable damage to said bondholders will ensue, and the property will be liable to be greatly depreciated, and to be involved in useless litigation; and your orator and its bondholders will lose the benefit thereof as a security for the payment of said bonds.

35 Seventh. In consideration whereof, and forasmuch as your orator is remediless in the premises at law, and is only relievable in equity, your orator prays the aid of this court:

That the said mortgage or deed of trust so executed and delivered to your orator, and hereinbefore mentioned and described, may be decreed to be a lien upon all and singular the property, real and personal and mixed, rights, franchises, lands, titles, railroad, and branches and extensions of said defendant railroad company.

That the amount due or owing for principal and interest upon the outstanding bonds secured by said mortgage, may be ascertained, adjudged, and determined; and that the defendant railroad company may be decreed to pay the same to your orator, in trust for the bondholders secured by said mortgage; and that in default of such payment that all and singular the said mortgaged premises, with the appurtenances, property, and effects, rights and immunities, and franchises in said mortgage mentioned
36 may be sold as one parcel, and not separately, under a decree of this honorable court; and, after deducting from the expenses of any such sale just allowances for all disbursements and expenses of the said sale, including attorney and counsel fees and a reasonable allowance to your orator for its fees and commissions in the execution of the trusts in said mortgage contained, and all payments which may be made for taxes or assessments, or prior liens on said mortgaged property, or any part thereof, the residue may be applied to the payment of the said outstanding bonds, issued under and secured by said mortgage to your orator, and of the interest which shall then have accrued, and be unpaid without preference, ratably to the aggregate amount of such unpaid principal and accrued interest, and that in case any surplus shall remain therefrom, that the same be paid over to said defendant railroad company; and that the said defendant railroad

company, and all persons claiming under it subsequent to the making of said mortgage, may be forever barred and foreclosed of and from
37 all equity of redemption and claim of, in, and to said mortgaged premises, and every part or parcel thereof.

To the end therefore that all the property, rights, immunities, and franchises of the said defendant railroad company may be subjected to the control of this court, your orator prays that the court will appoint a receiver, according to the course and practice of this court, with the usual powers of receivers in like cases of all the property, equitable interest, things in action, effects, money, receipts and earnings, rights and privileges, franchises and immunities of the said defendant railroad company, and of all the property included in and covered by the said mortgage executed to your orator as aforesaid.

And your orator further prays that a writ of injunction be issued out of and under the seal of this honorable court, or by one of your honors, directing, commanding, enjoining, and restraining the said defendant railroad company from interfering with, transferring, selling, or disposing of any of the property mentioned in and conveyed by the said mortgage, and from taking possession of, levying upon, or attempting to sell, either by judicial
38 process or otherwise, all or any portion of the property covered by said mortgage, and that your orator may have such further or other relief, or both, in the premises as may be just and agreeable to equity.

And may it please your honors to grant unto your orator the writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, and directed to the said defendant Cairo and Saint Louis Railroad Company, a citizen of the State of Illinois, therein and thereby commanding the said defendant railroad company on a day certain therein to be named and under a certain penalty therein to be inserted, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against it in the premises and as shall be deemed meet and agreeable to equity.

And your orator, as in duty bound, will ever pray, &c.

UNION TRUST COMPANY OF NEW YORK,
[SEAL.] By EDW'D KING, *President.*
JUDD & WHITEHOUSE,
Solicitors and of Counsel for Complainant.

WHEELER H. PECKHAM,
Of Counsel for Compl't.

39 UNITED STATES OF AMERICA,
State, City, County, and Southern District of New York, ss:

Edward King, of the county of Richmond and State of New York, being duly sworn, says he is president of the Union Trust Company of New York, the complainant in the foregoing bill of complaint named, and knows the contents thereof; that the said bill is true as to those matters, which are therein stated to be matters of record, and as to all the other facts therein stated he believes it to be true.

EDW'D KING.

Subscribed and sworn to before me November 21st, 1877.
[SEAL.] GEO. W. CARR,
Notary Public (75) *New York County.*

40 EXHIBIT A.

Mortgage or deed of trust.

This indenture, made the second day of October, in the year of our Lord one thousand eight hundred and seventy-one, between The Cairo and Saint Louis Railroad Company of the first part and The Union Trust Company, of the city of New York, of the second part.

Whereas the said party of the first part is a corporation duly formed and organized under the laws of the State of Illinois for the purpose of constructing, operating, and maintaining a certain railroad, to be constructed from East St. Louis, or Illinoistown, to Cairo, in the said State of Illinois.

And whereas, for the purpose of procuring the means necessary to construct and equip the said railroad, the said party of the first part, in pursuance of the powers and authorities in it duly vested, has resolved to issue and offer for sale and negotiation a series of two thousand five hundred bonds of one thousand dollars each, bearing date on the second day of October, A. D. 1871, and payable in thirty years from date, in gold coin of the United States of America, at the city of New York, or in British pounds sterling at the city of London, and bearing interest
41 at the rate of seven per centum per annum, payable semi-annually, in the like gold coin, at the city of New York, or in British sterling money, at the city of London, in England, all of which bonds are of like tenor, and in substantially the form following:

(Copy of bond.)

UNITED STATES OF AMERICA.

$1,000.] STATE OF ILLINOIS. [£200.

Cairo and St. Louis Railroad Company firs' mortgage sinking-fund bond.

Principal and interest payable in U. S. gold coin, or in British pounds sterling, at the option of the holder.

Know all men by these presents that the Cairo and St. Louis Railroad Company is indebted to the Union Trust Company of New York, or bearer, in the sum of one thousand dollars, gold coin of the United States of America, which sum the said company hereby promises to pay to the said Trust Company, or to the bearer hereof, on the second day of October, in the year of our Lord one thousand nine hundred and one, in gold coin of the United States of America aforesaid, at the office of the said Trust Company, in the city of New York, or in British pounds sterling, at the rate of four British shillings per dollar, at the agency of the
42 said railroad company in the city of London, England, at the option of the holder hereof, with interest on the said principal sum at the rate of seven per centum per annum, payable semi-annually, to wit, on the first days of April and October in each year, at the office of said Trust Company in the city of New York, in the gold coin of the United States aforesaid, or payable at the agency of said railroad company in the

city of London, England, in British pounds sterling, at the rate of four British shillings per dollar, at the option of the holder, upon presentation and surrender of the annexed coupons as they severally become due; which payment of interest shall in all cases be made, without deduction or abatement on account of any income or other tax imposed or to be imposed by the Government of the United States, or any law thereof, which the said company lawfully might deduct from such interest to pay over to any officer of said government, it being understood that such taxes are to be paid by the said company in addition to such interest.

And it is hereby expressly declared and agreed that if default
43 shall be made in the payment of any half-yearly instalment of interest on this bond when such instalment of interest shall become due and be demanded, and if such instalment of interest shall remain due and in arrear for the period of six months, the principal of this bond, as well as the principal of each of the bonds of the series of which this bond is one, can and may be declared and made to become due and payable immediately, in the manner and with the effect provided and declared in the deed of trust or mortgage hereinafter mentioned, notwithstanding that the time hereinbefore limited for the payment thereof shall not then have elapsed.

This bond is one of a series of two thousand five hundred bonds of like tenor and date, numbered consecutively from 1 to 2500, inclusively, and amounting in the aggregate to two millions five hundred thousand dollars, and the payment whereof is secured by a certain deed of trust or mortgage, bearing even date herewith, made by the said Cairo and St. Louis Railroad Company to the said Union Trust Company of New York as trustee, and which conveys to the said trust company the Cairo and
44 St. Louis Railroad, extending and to be constructed from Cairo to East St. Louis or Illinoistown, in the State of Illinois, being a distance of 147 miles, more or less, together with the equipments and appurtenances of the said railroad, and all other property, rights, and franchises held and to be acquired by said railroad company, and which deed also provides a sinking fund for the redemption of said bonds.

This bond shall pass by delivery, unless registered upon the books of the said company in the name of the holder, but after a registration of the ownership hereof, and the certification of such registration hereon by the transfer officer or agent of said company, no transfer of this bond shall be valid, unless such transfer be made upon the books of the said company by the registered holder in person or by attorney, but the bond may be transferred on said books to bearer and transferability by delivery thereby restored, and it shall continue capable of being successively registered in the name of the owner and transferred to bearer at the option of each and every person who may become a holder thereof.

This bond shall not become valid or obligatory until the certificate authenticating the same, which is endorsed hereon, shall have been duly signed by the president or duly authorized officer of the said trust company.

45 In witness whereof the said railroad company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its president and secretary, and has likewise caused

the signature of its secretary to be attached to the several coupons hereunto annexed this second day of October, A. D. 1871.

Secretary. *President.*

And whereas each of the said bonds has annexed thereto coupons or interest-warrants representing the several semi-annual instalments of interest to fall due thereon, which coupons bear the lithographed signature of the secretary of said company, and are all of similar tenor, except as to the dates of payment, and are, omitting the date of payment, in substantially the following form:

Copy of coupon.

The Cairo and St. Louis Railroad Company will pay the bearer thirty-five dollars in United States gold coin at the office of the Union Trust Company of New York, or seven pounds sterling at the agency of said railroad company in London, England, at his option, on the first day of , being six months' interest due that day, on its first-mortgage sinking-fund bond No.

46 D. HURD, *Secretary.*

Now, therefore, this indenture witnesseth that the said party of the first part, in order the better to secure the payment of said bonds, and for and in consideration of the premises, and of the sum of one dollar to the said party of the first part duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, convey, and transfer unto the said party of the second part to these presents and unto its successors and assigns all and singular the railroad of the said party of the first part, or which the said party of the first part is by law authorized to construct, and which is known or to be known as the Cairo and Saint Louis Railroad, extending and to be constructed from the city of Cairo, in Alexander County, Illinois, to the city of East St. Louis, or Illinoistown, in St. Clair County, in said State, being a distance of one hundred and forty-seven (147) miles, more or less; and also all rolling-stock, equipment, and machinery connected or be connected with said railroad, and all property, rights, and franchises now held or hereafter to be acquired by the said party of the first part, its successors or assigns, including all the railways, ways, and rights of way, and all the depot
47 grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine-shops and other shops held or acquired, and which shall be held or acquired, for use in connection with the said railroad, or in connection with the business thereof, and including also all the locomotives, tenders, passenger, baggage, freight, and other cars, and all the rolling-stock and equipment, and all the machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing the said railroad, or the equipments or appurtenances of the said railroad, now held or hereafter to be acquired by the said party of the first part; and including also all the franchises of the said party of the

first part connected with or relating to the said railroad, or to the construction, maintenance, or use thereof, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad and premises, or any part thereof, belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes,
48 rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part and parcel thereof, with the appurtenances; and also all books of account and vouchers kept and to be kept by the said party of the first part, and all other property whatsoever which the said party of the first part now holds or shall hereafter acquire.

To have and to hold the said railroad, lands, and premises, and all the franchises and property hereinbefore described, unto the said party of the second part, its successors and assigns, forever; but in trust, nevertheless, for the uses and purposes, and with and subject to the powers, agreements, and conditions hereinafter mentioned and set forth, that is to say:

ARTICLE FIRST. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest on said bonds, or in the payment of the sinking fund hereinafter created, or in the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, or in the payment of the principal of said bonds, the said party of the first part, its suc-
49 cessors and assigns, shall be suffered and permitted to remain in the actual possession of the said railroad and premises, and to exercise the franchises and rights relating thereto; and to collect, receive, and use the tolls, incomes, rents, revenues, issues, and profits thereon in any manner which will not impair the lien created by these presents.

And the said party of the first part hereby covenants, promises, and agrees to and with the said party of the second part, and to and with its successors in the trust hereby created, that the said party of the first part shall and will diligently and faithfully use and apply the net proceeds of the negotiation of said bonds in and to the construction of said railroad, and that, remaining in the possession of the said railroad and premises, the said party of the first part, its successors or assigns, shall and will keep the said railroad in good order and safe-running condition, and shall and will, from time to time, pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the said railroad and premises, or upon any part thereof, the lien of which might or could be held to be prior to the lien of these presents, so that the priority of these
50 presents may be duly preserved, and that the said party of the first part shall not and will not do or suffer any act or thing whatsoever whereby the lien hereof might or could be impaired until the said bonds and all interest thereon shall be fully paid and satisfied.

ARTICLE SECOND. In case default shall be made in the payment of any semi-annual instalment of interest which may accrue upon the said bonds, or upon any of them, when such interest shall become due and be demanded, and such interest, or any part thereof, shall remain unpaid and in arrear for the period of three months, or in case default shall be made in the payment of any instalment of the moneys hereinafter provided to be

paid to the trustee as a sinking fund for the purchase or redemption of said bonds, and such default shall continue for six months, or in case default shall be made in the due observance and performance of the covenant of further assurance hereinafter set forth, or in case default shall be made in the payment of any taxes, assessments, or other governmental charges which may be lawfully levied or imposed upon the said railroad and premises, or any part thereof, and the lien whereof might or could be held prior to the lien of these presents, and if either of said last-mentioned de-
51 faults shall continue for the period of one year, or in case default shall be made in the payment of the principal of said bonds, or of any one of them, then, and in any and every such case of default, it shall be lawful for the said party of the second part, as such trustee, by its duly authorized officer, attorney, or agent, to enter into and upon the railroad and premises hereinbefore granted or conveyed, and each and every part of the same, and from thenceforth the said railroad and premises, and each and every part thereof, and all and singular the rights and franchises hereinbefore granted, to have, hold, possess, and enjoy, operating the said railroad by such superintendents, managers, receivers, assistants, and servants, or other attorneys or agents, as the said trustees shall deem proper, and making from time to time all such repairs and replacements, and all such useful alterations, additions, and improvements to the said railroad and premises as the said trustee may deem expedient and judicious. And it shall likewise be lawful for the said trustee, after any and every default happening and continuing as aforesaid, to collect and receive all tolls, fares, freights, rents, revenues, incomes, issues, and profits of the
52 said railroad and premises, and of every part and parcel thereof, and after deducting therefrom all the expenses lawfully incurred in making such entry, or in otherwise obtaining possession of said premises, including reasonable attorney and counsel fees, as well as any and all expenses of holding, operating, and managing the said railroad and premises, and conducting the business thereof, including the cost and expense of all such repairs, replacements, alterations, additions, and improvements as may be made by said trustee as aforesaid, and all payments which may be made or be due for taxes and assessments, or other charges or liens prior to the lien of these presents upon the said railroad and premises, or upon any part or parcel thereof, and just compensation for the trustee's own services, to apply the residue of any and all tolls, incomes, rents, revenues, issues, and profits of the said railroad and premises which may be received by it as aforesaid, as follows, to wit: First, to the payment of all overdue interest on the said bonds, with interest thereon; and, secondly, to the payment of all interest accruing during such possession of said
53 trustee, which payments of interest shall be made to the holders of the bonds and coupons evidencing the right to the same ratably, and without discrimination or preference between them. And if in any six months of such possession of said trustee, after payment of all interest on said bonds, a surplus of money, arising from the said railroad and premises as aforesaid, shall remain the same shall be applied in and to the purposes of the sinking fund hereinafter created.

ARTICLE THIRD. In case default shall be made in the payment of interest on any of the said bonds, and such interest shall remain unpaid and in arrear for the space of three months, as aforesaid, or in case default

shall be made in the payment of any instalment which shall become payable into, or for the purposes of, the sinking fund hereinafter created, and such default shall continue for six months, or in case default shall be made in the payment of the principal of any of said bonds, it shall likewise be lawful for the said party of the second part, being trustee under these presents, after entry upon the said premises, as aforesaid, or without any entry thereon, to sell and dispose, by its duly authorized attorney or agent, of all and singular the railroad and property and the rights
54 and franchises hereinbefore granted or conveyed, which shall then be or remain subject to the lien or operation of these presents, at public auction, in the city of New York, or in either of the cities of Cairo or St. Louis, or in any county in Illinois through which the said railroad may run which the trustee may in its discretion designate, and at such time as it shall appoint. But preparatory to such sale the said trustee shall give public notice of the time and place when and where the same is to be made, by advertisement thereof, published in two newspapers at the city of New York, and also in one newspaper in each of the cities of Cairo and St. Louis, at least three times a week for six successive weeks; and it shall be lawful for said trustee to make and deliver to any purchaser or purchasers at such sale a good and sufficient deed or good and sufficient deeds in the law of and for the railroad and property which shall be sold, as aforesaid, to such purchaser or purchasers. And it is hereby expressly declared and agreed that any sale which shall be made as aforesaid shall be a perpetual bar, both at law and in equity, against the said party of the first part, its successors and assigns, and against any and all persons whomsoever claiming or to claim the railroad, or other property so sold, or any part or parcel thereof, by, from, through, or
55 under the said party of the first part, its successors or assigns. And after deducting from the proceeds of such sale just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses, and liabilities which may have been made or incurred by the said trustee in operating or maintaining the said railroad or in managing the business thereof, while the same shall have been in the said trustee's possession, or in arranging for making or completing the sale aforesaid, and also all payments which may have been made by said trustee for taxes and assessments or other charges or liens prior to the lien of these presents, if any such there shall be on the said railroad and premises or on any part thereof, as well as just and reasonable compensation for the said trustee's own services, the said trustee shall apply the purchase-money and proceeds of such sale to the payment of the principal of such of the said bonds as may be at that time outstanding and unpaid, whether or not such principal thereof shall have by the terms of said bonds previously become due, and of the interest which shall have accrued upon the said principal up to that time and be unpaid, with interest thereon, if the same be overdue, without discrimination or pref-
56 erence as between principal and interest, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest, it being understood and hereby declared and agreed that upon any sale of said premises which may be made as aforesaid, or upon any sale thereof which may be made under or by virtue of the judgment or decree of any court of competent jurisdiction rendered in any suit or proceedings

for the enforcement or foreclosure of the lien hereby created, the principal of all the bonds aforesaid shall become and be immediately due and payable, which payment shall be made to the persons holding the bonds and coupons, evidencing the right to such principal and interest, without discrimination or preference between them, on account of the time of the actual issue of said bonds; and if after payment in full of all the said bonds, principal and interest, including the interest on overdue coupons, a surplus of the said proceeds of sale shall remain, the said trustee shall pay over such surplus to the said party of the first part hereto, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

57 And it is hereby declared and agreed that the said trustee may adjourn such sale, by announcement made at the time and place appointed for such sale, and if so adjourning such sale may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof. And it is further declared and agreed that the receipt of the trustee shall be a sufficient discharge to the purchasers or purchaser of the property which shall be sold, as aforesaid, for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not after paying such purchase-money and receiving such receipts be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of such purchase-money or any part thereof.

And it is hereby further declared and agreed that in case of default as aforesaid the party of the first part shall waive, and it does hereby waive, the benefit of any and all extension, stay, and appraisement laws which now exist or shall hereafter be enacted.

58 ARTICLE FOURTH. It is hereby mutually agreed that at any public sale of the railroad and property hereinbefore conveyed, made by virtue of the power hereinbefore granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the trustee under these presents for the time being may, in the discretion of such trustee, and not otherwise, bid for, and if the same be obtainable at the price hereinafter mentioned, purchase and acquire the property so offered for sale in behalf of all the holders of the bonds secured by this instrument which shall then be outstanding, in proportion to the amount of said bonds, and of the overdue coupons thereunto belonging by them respectively held; provided, however, that nothing herein contained shall authorize the said trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, and the expenses of such sale, for the entire property then held upon the trusts of this indenture, or an amount reasonably proportionate thereto for any part of the said property.

And it is hereby further agreed that the bonds and overdue coupons aforesaid shall be received in payment of the purchase-money as would be distributable and payable thereon.

59 ARTICLE FIFTH. In case default shall be made in the payment of any semi-annual instalment of interest to accrue on any of the said bonds when such interest shall become payable, and if such interest shall remain unpaid and in arrear for the space of six months, then and in each and every such case of the happening and continuing of such default

in the payment of interest, the principal of each and all of the said bonds may be declared by the trustee for the time being hereunder, or by a majority in interest of the holders of all of said bonds thus outstanding, at its or their option, to be, and thereupon the same shall become due and payable immediately, notwithstanding that the time limited therein for the payment thereof may not have elapsed; which declaration shall be made by an instrument in writing, under seal, duly served on the said party of the first part, or by a vote of said bondholders at a meeting duly held, but if such option be exercised by the said trustee, any declaration made by it may be annulled or reversed by a majority in interest of the holders of said bonds, and held as hereinafter provided, and attested by an instrument in writing, under the hands and seals of the persons
60 so voting, or of their agents or attorneys thereunto lawfully authorized.

Provided always, that no act or omission of the said trustee, or of the said bondholders, in respect to any default in the payment of interest which may have happened, shall be held to exhaust or impair the option hereby granted, or to extend to or affect any subsequent default, or to impair the rights which would otherwise arise therefrom.

ARTICLE SIXTH. The said party of the first part shall and will, on or before the first day of May, in the year of our Lord one thousand eight hundred and seventy-three, pay over to the trustee for the time being under this indenture, the sum of twelve thousand and five hundred dollars, as and for the first instalment of a sinking fund for the redemption and cancellation of said bonds; and the said party of the first part shall and will semi-annually thereafter, namely, on or before the first days of May and November, in each year, until the said bonds shall become due and payable, or have been all redeemed, pay over to the said trustee the like sum of twelve thousand five hundred dollars, and, in addition thereto, a further sum equal to six months' interest upon the aggregate amount of bonds which, up to the time of such payment, shall have been redeemed through the said sinking fund, so that although the bonds re-
61 deemed shall be cancelled, the said sinking fund shall be semi-annually augmented by an amount equivalent to the interest which would be due thereon if the said bonds had remained in force. The moneys so paid over to the said trustee, as a sinking fund, shall be used and applied to and for that purpose in the manner following:

The said trustee shall, within a reasonable time after each such payment, give public notice of the amount of moneys so paid, and invite proposals in writing to be sent for the sale to said trustee of bonds secured to be paid hereby, which public notice shall be given by advertisements, published at least three times in each week for three weeks in two newspapers of good circulation in the city of New York and one newspaper in the city of London; and after the expiration of three weeks from the last publication of such notice, the said trustee shall apply the money so paid for such sinking fund in and to the purchase of said bonds, and shall accept and purchase the same from the parties offering at the lowest rates, without discrimination or preference in favor of one as against the other, provided that said bonds shall be so offered and can be purchased at not exceeding a premium of ten per centum upon the par value thereof, with the interest accrued thereon; and provided further, that the said trustee

may purchase said bonds, or any of them, at the stock exchange in the city of New York, or in the city of London, or at any public or private sale thereof, if such bonds can be thereby obtained at a cheaper rate than by purchase from parties offering pursuant to such advertisement. 62

The expenses connected with the advertisement for and purchase of bonds aforesaid, shall and may be defrayed out of, and the same shall be a charge upon, the said sinking fund.

In case the said bonds cannot be purchased at the premium of ten per cent. aforesaid, the moneys applicable to the purchase thereof shall be temporarily invested in bonds of the United States Government, which shall be duly registered in the name of the trustee hereunder, and shall be held by such trustee for the benefit of the said sinking fund until the same can be applied to the purchase of said bonds at such rate.

The trustee shall keep a correct account of all moneys so paid into said sinking fund, and of the disposition made of the same, and also a registry of the numbers of the bonds secured to be paid hereby, which shall be purchased with the moneys of the said sinking fund, and the prices paid for the same, which registry and account shall, at all reasonable hours and times, be open to the inspection of any holder of said bonds, as well as of the president or secretary, or other duly authorized officer or agent of the said party of the first part, and the said trustee shall annually, to wit, on or before the thirty-first day of December, in each year, furnish a transcript of such registry and account to the said party of the first part, which transcript the said party of the first part shall publish in the annual reports to be made by it to its stockholders. 63

All bonds the payment whereof is hereby secured, which may be purchased by the trustee hereunder, as aforesaid, shall at once be cancelled and delivered up to the said party of the first part.

ARTICLE SEVENTH. It is hereby expressly declared and agreed, that in case default shall be made in the payment of interest upon any of the said bonds, when such interest shall become payable and demanded, or in case default shall be made in the payment of any instalment of the sinking fund hereinbefore provided for, and if such default shall continue for the space of six months, or in case default shall be made in the payment of the principal of any of the said bonds, when the same shall become due, then and in either and every such case of default it shall be the duty of the trustees for the time being, under these presents, to exercise the powers of entry and sale hereinbefore granted, or to take appropriate legal proceedings to enforce the rights of the holders of said bonds, upon a requisition to that effect being made upon the said trustee, signed by holders of at least five hundred thousand dollars, in amount of the said bonds, and upon a proper indemnification to said trustee against all costs and expenses to be by such trustee incurred in the premises. 64

ARTICLE EIGHTH. The trustee shall, at all times during the continuance of the trust hereby created, have full power and authority, to be exercised in the said trustee's own discretion, and not otherwise, to grant and convey to any party who may be designated, in writing, by the said party of the first part, its successors or assigns, or to release from the lien and operation of these presents in such other manner as said trustee may deem proper, any portion of the premises hereinbefore granted, which may have

been held for use in connection with the said railroad, but which, in the judgment of the said trustee, shall have become unnecessary or unadapted for use in connection therewith, and which shall have been acquired
65 or held for stations, depots, shops, or other buildings, or for supplying fuel, gravel, or other material, and also, to convey or release as aforesaid, on like request, any lands not occupied by the track, which may become disused by reason of a change in the location of any station-house, depot, shop, or other building connected with the said railroad, and such lands occupied by the track and adjacent to such station-house, depot, shop, or other building, as the said party of the first part, its successors or assigns, may deem it expedient to disuse or abandon by reason of such change; and the said trustee may consent to any changes in the location of any depot, shop, or other building, which in its judgment shall have become expedient, and make and deliver the instruments necessary or proper to carry the same into effect. Provided always, that any and all lands and premises which shall be acquired for permanent use in substitution for any so released, shall be conveyed to the trustee upon the trusts of these presents, and the said trustee shall have full power to allow the said party of the first part, its successors or assigns, from time to time, to dispose, according to its or their discretion, of such portion of the equipment, machinery, and implements, which shall be at any time held or acquired for the use of the said railroad, as shall have become unfit for such
66 use; but any and all new or other equipment, machinery, or implements which may be acquired, in substitution for any so released, shall by virtue and force hereof, become and be, immediately upon the acquisition of the same, subject to the lien and operation of these presents, without any new conveyance or transfer, or other act or ceremony whatsoever.

ARTICLE NINTH. The said party of the first part shall and will, before the first coupon annexed to said bonds shall have become due, appoint and designate an office or agency in the city of London, England, for the payment of the interest on said bonds in British money, and for the registration and transfer of said bonds, and the said party of the first part shall and will, from thenceforth and at all times while the said bonds or any of them remain outstanding, maintain and keep an office or agency for such purposes at said city.

ARTICLE TENTH. If the party of the first part shall well and truly pay all interest upon the said bonds when such interest shall become due, and all instalments into and for the purposes of the sinking fund aforesaid, and shall also well and truly pay and discharge the principal of
67 each of the said bonds, when the same shall become due, according to the tenor of said bonds, and the true intent and meaning of these presents, then and thereupon, that is to say, upon the payment of said bonds and of all interest thereon, all the estate, right, title and interest of the said parties of the second part, or of its successor in the trust hereby created, shall cease, determine, and become void otherwise the same shall be and remain in full force and virtue.

ARTICLE ELEVENTH. It is mutually agreed by and between the parties hereto that the word trustee, as used in these presents, shall be construed to mean, and the said word is intended to designate the party or parties who may for the time being be charged with the execution or enforcement

of the trusts hereby created, whether such party or parties be a body corporate or a natural person or natural persons; and it is further agreed that the said trustee shall be entitled to just and reasonable compensation for all services which may hereafter be rendered by such trustee in this trust, to be paid by the said company, or out of the income of the property; that the said trustee shall not be answerable for the default or misconduct of any agent or attorney who may be appointed by it pursuant hereto, if such agent or attorney be selected with reasonable care, or for anything whatsoever, in connection with this trust, except wilful misconduct or gross negligence that the said trustee or any trustee hereafter appointed may be removed by the vote of a majority in interest of the holders of said bonds, cast at a meeting of said bondholders, duly convened and held, and attested by the hands and seals of the chairman and secretary of such meeting, or by an instrument in writing, under the hands and seals of such majority in interest of said bondholders, duly acknowledged. And it is further mutually agreed that the said trustee or any trustee hereafter appointed, may resign and be discharged of the trust created by these presents, by giving notice in writing to the said party of the first part, at least three months before such resignation shall take effect, or such shorter notice as may be accepted by the said company, and upon the due execution of the conveyance hereinafter required.

68

And it is hereby declared and agreed that in case at any time hereafter the said trustee shall resign or be removed or become incapable or unfit to act in the said trust, the holders of the bonds secured hereby, acting by a majority in interest, shall be, and they are hereby, authorized and empowered by an instrument or instruments in writing, under their respective hands and seals, duly acknowledged as aforesaid, or by a vote, attested as aforesaid, at a meeting of said bondholders duly convened, to appoint a successor or successors to such trustee; and such successor or successors when so appointed shall immediately upon its, his, or their acceptance of the trust, become vested with all the powers, authorites, and estates held or possessed by the trustee, to succeed whom it, he, or they shall have been appointed, without any further assurance or conveyance; and thereupon all the powers and authorities hereunder, and all the estate, right, title, and interest in the said premises of such resigned or removed trustee shall wholly cease and determine; but, nevertheless, the trustee resigning or being removed as aforesaid shall, upon the request in writing of the new trustee or trustees, execute and deliver to it, him, or them, all such conveyances and other instruments as shall be fit and expedient for the purpose of assuring to such new trustee or trustees the legal estate in the premises, provided the expense of the preparation and execution of such instruments be defrayed by the said party of the first part, or the said new trustees or trustee, or other parties in interest.

69

And it is hereby declared and agreed that in case the bondholders shall fail or omit to appoint a new trustee in the manner aforesaid, within ninety days after such resignation or removal of any trustee, application may be made by any holder or holders of said bonds, to the aggregate amount of one hundred thousand dollars, in the name and on the behalf of all the holders of said bonds, or otherwise, upon reasonable notice to the said party of the first part, its successors or assigns, to any court of competent jurisdiction, for the appointment of a new trustee.

70

And it is hereby further expressly declared and agreed that whenever and as often as any contingency shall arise in which the action of a majority in interest of the holders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, it shall be the duty of the trustee hereunder, and such trustee is hereby authorized and required to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement (the expense whereof shall be a liability of the said party of the first part hereunder, and may be defrayed, if necessary, from any trust funds) to be pub-
71 lished three times in each week, for six weeks, in two newspapers of good circulation amongst the business community in that city, one newspaper in the city of St. Louis and one newspaper in the city of London, England; and in default of such meeting being called by the said trustee within thirty days after notification in writing to him by any bondholder of the necessity therefor, it shall be competent for any holder or holders of said bonds, to the aggregate amount of one hundred thousand dollars, to call said meeting in the manner aforesaid: provided always, that nothing hereinbefore contained shall be held to require the said trustee to incur any personal liability in the calling or holding of such meeting; and that at any meeting called as aforesaid a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings, and the regulation of the proceedings thereof. And it is hereby declared and agreed that at any meeting so convened the holders of said bonds shall be competent to exercise in person or by proxy all the powers and authorities conferred upon them by these presents.

And this indenture further witnesseth that the said party of the
72 first part, for the consideration aforesaid, has promised and agreed, and does hereby covenant, promise, and agree to and with the said party of the second part, and its successors in the trust hereby created, that the said party of the first part, its successors and assigns, shall and will well and truly pay, or cause to be paid unto the holder or holders of said bonds the principal and interest thereof as the same shall become payable, according to the tenor of said bonds, and the terms of the coupons thereto annexed, and shall and will do, observe, and perform any and every act and thing mentioned in or required by these presents to be by it or them done, observed and performed. And that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge, and deliver all such further deeds, conveyances, and assurances in the law for the better assuring unto the said party of the second part, and unto its successors and successor in said trust, upon the trusts herein expressed, the railroad aforesaid with its appurtenances, and the rolling stock, equipment, machinery, franchises, property, and things aforesaid, and particularly any and all property, rights, and fran-
73 chises whatsoever which shall or may at any time hereafter, while the said bonds or any of them remain unpaid, be acquired by the said party of the first part, its successors or assigns, as by the said trustee, or by its counsel learned in the law shall be reasonably advised, devised, or required.

In witness whereof the said party of the first part has caused its cor-

porate seal to be hereunto affixed and these presents to be signed by its president and secretary; and the said party of the second part, in order to evidence its acceptance of the trust hereby created, has also caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary the day and year first above written.

{ SEAL OF C. & ST. L. R. R. CO. } CAIRO AND SAINT LOUIS RAILROAD COMPANY,
By STAATS TAYLOR, *President.*
DANIEL HURD, *Secretary.*

{ SEAL OF UNION TRUST CO. } UNION TRUST COMPANY OF NEW YORK,
By J. H. FROTHINGHAM, *President.*
C. T. CARLTON, *Secretary.*

Signed, sealed, and delivered in the presence of—
74 As to S. S. Taylor, president, J. H. Frothingham, and C. T. Carlton—
JAS. P. LOVITT.
CHARLES NETTLETON.

(Endorsed:) Filed December 6, 1877. J. A. Jones, clerk.

75 In the circuit court of the United States for the southern district of Illinois.

THURSDAY, *December 6th, A. D.* 1877.

Present, Hon. Samuel H. Treat, district judge.

THE UNION TRUST COMPANY OF NEW YORK
v.
THE CAIRO & ST. LOUIS RAILROAD COMPANY. } In chancery.

And now on this sixth day of December, A. D. 1877, the complainant in the above-entitled cause having filed its bill of complaint in this court, duly verified by affidavit, and having, by Messrs. Judd & Whitehouse, its solicitors, entered its motion for the appointment of a receiver of the property, equitable interests, things in action, effects, money, receipts, and earnings, rights, privileges, franchises, and immunities of the defendant The Cairo & St. Louis Railroad Company, and of all the property, rights, effects, and interests included in and covered by the mortgage executed to complainant, and mentioned and referred to in the said bill of complaint, and it appearing to the court that the complainant has given the said railroad company, defendant, reasonable notice in writing that such bill of complaint would be filed in this court on or before this day, and that application would thereupon be made to the court for the appointment of
76 a receiver as aforesaid; and the said railroad company, defendant, being now present in open court by its president, and no objection being interposed to the present consideration of said motion, and no reason being given why such motion should not be allowed;

And the court having considered said bill of complaint and the exhibits, and also the affidavit filed in verification of the bill; and the court being now sufficiently advised in the premises:

It is ordered, adjudged, and decreed by the court that Henry W. Smithers be, and he is hereby, appointed receiver in this cause, in accordance with the prayer of the bill of complaint, and in compliance with said motion, who shall enter on his duties on giving bond, with security, in the sum of thirty thousand dollars, to the satisfaction of the court.

And the said Smithers having now here appeared in open court and presented and filed his bond with security, approved by the court, which bond is properly conditioned, and in all respects satisfactory to the court, and said Smithers having now also taken oath before the clerk of this court faithfully to perform his duties as receiver in this cause,

It is further ordered, adjudged, and decreed that, as such receiver, the said Henry W. Smithers be and is hereby, authorized and required with all convenient dispatch to take possession, management, and control of said railroad, and of the telegraph property belonging thereto and connected therewith, and of the money and assets, real, personal, and mixed, and of all the property, rights, effects, equitable interests, choses in action, income, receipts, and earnings, privileges, franchises, and immunities, roadbed, road, iron, ties, tracks, side-tracks, switches, station-houses, warehouses, water stations, turn-tables, and all grounds, lands, and rights of way in use, or necessary or convenient to be used, in operating said road and telegraph property belonging to said company, legally or equitably, and all engines, locomotives, cars, and rolling stock of every kind belonging to said railroad company, and all furniture, tools, implements, and materials, and all other property, rights, claims, and interests whatsoever of the said Cairo and Saint Louis Railroad Company, wherever the same may be found, including all supplies of materials provided by said railroad company to be used in the construction, reconstruction, or repairs of its said
77 railroad, railroad and telegraph property, or in operating the same, and all machine-shops and workshops, and the machinery, tools, and implements therein or belonging thereto, and all stock of wood, iron, or other materials on hand belonging to said railroad company, to be used in the construction or repairs of shops or shop machinery or engines, locomotives or cars; and the same to hold, use, and dispose of under the order of the court.

And said receiver is hereby authorized and required, until further and other order, to operate, manage, and control said railroad, and all said property, effects, and rights, and to manage, control, and exercise all the franchises, property, and affairs whatsoever of said railroad company, according to his judgment, to the best advantage for the interests of the parties concerned, and generally to maintain said road and telegraph property, the engines, locomotives, cars, rolling stock, and fixtures, and appurtenances, in good, efficient, and safe condition for use, and to provide, for that purpose, by purchase for cash or on credit, or partly for cash and partly on credit, materials and supplies whenever necessary. And the said railroad company, and its officers, agents, servants, and employees, having the custody and charge of the property and effects of said railroad company, or any part thereof, are hereby ordered and required to forthwith, upon request of said receiver, or his attorneys or agents or employees, to surrender the same, and all books, papers, accounts, vouchers, agreements, and evidences of debt due to said railroad company, and all matters or things in which said railroad company has any beneficial interest; and all of the

same without any such actual delivery shall be held and taken to be vested in the actual possession of said receiver, and subject to his order and control; and said receiver is directed to take an inventory of all and singular the property and effects, of every description, which may come into his possession or under his control, in virtue of this decree, and to file such inventory in this court within sixty days from the rendition of this decree.

And the said receiver is hereby authorized and empowered to retain, employ, and pay all such agents, officers, conductors, servants, laborers, clerks, and assistants as in his discretion may be necessary under this decree, or to carry the same into effect, with economy and prudence, and to make, enter into, and perform any and all contracts for the obtaining of necessary materials and supplies, and for prosecuting the business of operating and maintaining said railroad, repairing the same, or in performing any of the duties or powers specified in this decree.

78 And for such purposes, and for the purpose of paying all rentals upon leased property and equipments, and terminal expenses, and any balance due to other railroads on interchange of freight and ticket business, and also any necessary and reasonable expenses in maintaining the corporate organization of said railroad company, said receiver, subject to the further or other order of this court, is hereby fully authorized and empowered to appropriate and apply the property, money, and effects aforesaid, with the income and current earnings of said railroad business, so far as the same may be necessary. And said receiver is hereby ordered and required to keep, or cause to be kept, in regular and systematic order, strict and accurate accounts of the business of said trust in his hands, and of the daily receipts and disbursements of money, showing the items in sufficient detail; and he is required to file in the office of the clerk of this court, once in each month, and within twenty (20) days after the expiration of each month, an abstract account of his receipts and disbursements, and he shall, as often as required by this court, make full reports of his doings and settle accounts.

And for the purpose of better enabling the said receiver to execute the authority and requirements of this decree,

It is further ordered and decreed that he shall have full power and authority to examine the officers, agents, and employees of said railroad company, and such other persons as he may deem proper, on oath, before the master in chancery of this court, from time to time.

And it is further ordered and decreed that said receiver is hereby authorized and required, in his discretion, except and unless as hereafter otherwise directed by this court, to prosecute, defend, and continue all suits and proceedings brought by or against the said railroad company, whether heretofore or hereafter commenced, and whether in the name of said railroad company or otherwise, and to prosecute appeals or writs of error to the higher courts, in all cases in which, in the opinion of counsel in charge of the cases, such appeals or writs of error ought to be prosecuted. And he is also authorized to defend all suits brought against him as such receiver, or affecting the receivership, or any of the property, assets, rights, or privileges committed to his charge by this decree, and to bring such suits or proceedings, as receiver, or in the name of said railroad company, as he may be advised by counsel to be necessary or proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the

assets, franchises, necessary rights of way, property rights, interests, and privileges of said railroad company or of his receivership.

79 And he is hereby authorized to pay all necessary costs and expenses of any such litigation.

And the said receiver is hereby authorized to employ such attorneys, solicitors, and counsel as he may deem necessary to manage in his behalf any and all such suits or proceedings and other affairs as have arisen or may arise, and to advise such receiver in relation to the performance of his duties; and he is authorized to pay reasonable compensation for any services rendered by any such attorneys, solicitors, or counsellors under his employment.

And it is further ordered and decreed that said receiver is authorized and empowered in his discretion to remove any of the officers or employees of said railroad company other than the president and directors thereof, and except such other officers as are necessary to maintain the corporate organization; but notwithstanding this reservation the entire management of said road and the power to appoint and remove a general manager and all superintendents, engineers, conductors, and other agents and employees in any way concerned in operating said road, or in repairing and keeping the same in proper order and preservation, shall belong to the receiver.

The receiver, acting in pursuance of any order or decree of this court herein, in good faith, shall not be individually liable for any breach of any contract entered into by him as such receiver, or for any injuries to the person or property of the parties to such contract, or third persons, or for the faults or negligences of his subordinates; but the property, monies, and effects that shall at any time be in his hands as such receiver shall be found for all such breaches or wrongs, and may from time to time, as may be necessary, be applied in such manner as this court shall direct.

And it is further ordered and decreed that said receiver shall pay all sums which are now, or may hereafter, become due for taxes upon any of the property coming into his hands or under his control as such receiver, and also all interest and principal due or to become due upon any purchase of property which may come into his hands as receiver, and which in his judgment will be beneficial to the estate in his possession to pay.

And said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing

80, 81 by said railroad company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree. And when necessary said receiver may in his discretion, irrespective of other things, pay out of any moneys coming into his hands any balances or portions of balances due, as aforesaid, for such labor.

And if, after making all payments herein authorized, there shall remain in the hands of the receiver at any time any surplus monies, he shall report the same to this court, and await the further order of the court in respect to the disposition of the same.

And it is further ordered that the said receiver shall deposit any funds that may come to his hands as such receiver with the banking-house of Bartholow, Lewis & Co., of St. Louis, Missouri.

And it is further ordered that said Henry W. Smithers, receiver, shall be paid as compensation for his services as such receiver the sum of three thousand dollars per annum, payable monthly on his own receipt filed.

And it is further ordered and decreed that the said railroad company, defendant, and its officers, agents, servants, and employees, be, and they and each of them are hereby, enjoined and restrained from interfering with, transferring, selling, or disposing of any of the property or effects mentioned in or covered by the said mortgage deed referred to in the bill of complaint filed in this cause, and from taking possession of or attempting to control or in any way to molest all or any portion of such property or effects until or unless otherwise ordered by this court, and that a writ of injunction, in due form, be issued accordingly if the receiver shall apply therefor; but this restraining order shall not be construed to prevent the ratification by the board of directors of any contract in writing recently agreed to and executed between the president of said railroad company and certain attorneys in regard to their fees and expenses in and about proceedings to compel the issue of bonds in payment of subscriptions by certain municipal corporations to the capital stock of said railroad company.

82 In the circuit court of the United States, southern district of Illinois.

MONDAY, *May* 16*th*, A. D. 1881.

Present, Hon. Samuel H. Treat, judge.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY, Willis Cauble, and Henry Holbrook. } In equity.

Decree for payment and sale.

And now, on this 16' day of May, A. D. 1881, at the January term, A. D. 1881, of this court, this cause came on for final hearing, upon the several pleadings, proofs, and exhibits herein, and upon the decree pro confesso heretofore entered against the defendant The Cairo and St. Louis Railroad Company, the complainant being represented by Messrs. Judd and Whitehouse, its solicitors, and the defendants, Henry Holbrook and Willis Cauble, being represented by their respective solicitors; and the court, having examined the depositions taken and filed herein, and having considered the same, and the exhibits referred to, and having also heard and considered the other proofs taken in said cause in open court, and having also heard the arguments of counsel upon the merits, and being now fully advised and satisfied in the premises, doth find and determine, from such depositions, exhibits, and other proofs, as follows:

I. That, at the times hereinafter mentioned, the defendant, The Cairo and St. Louis Railroad Company, was, and still is, a railroad corporation, created, organized, and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois; and that, at
83 the times also hereinafter mentioned, the complainant, The Union Trust Company of New York, was, and still is, a corporation duly

created, organized and existing under and by virtue of the laws of the State of New York, having its place of business in the city and State of New York, and was and is a citizen of said State of New York.

II. That on or about the second day of October, in the year of our Lord one thousand eight hundred and seventy-one (A. D. 1871), the said Cairo and St. Louis Railroad Company, to secure the payment of certain bonds to be issued by said Cairo and St. Louis Railroad Company, duly executed, under its corporate seal, and delivered to the complainant, The Union Trust Company of New York, its certain mortgage or deed of trust, bearing date on that day, and which mortgage or deed of trust was duly acknowledged by and on behalf of said Cairo and St. Louis Railroad Company, by S. Staats Taylor, the then president thereof, on the 9th day of February, A. D. 1872, and also by Daniel Hurd, the secretary of said Cairo and St. Louis Railroad Company, on the 20th day of February, A. D. 1872, and which mortgage or deed of trust was also duly executed by said trustee corporation by J. H. Frothingham, its president, and C. T. Carlton, secretary, and duly acknowledged on behalf of said trustee by its said president and by its said secretary, on the said 9th day of February, A. D. 1872, in and by which said mortgage or deed of trust the said Cairo and St. Louis Railroad Company granted and conveyed unto said complainant, as trustee, all and singular the railroad of said Cairo and St. Louis Railroad Company, or which the said Cairo and St. Louis Railroad Company was by law authorized to construct, known as the Cairo and St. Louis Railroad, extending from the city of Cairo, in Alexander County, Illinois, to the city of East St. Louis, or Illinoistown, in St. Clair County, in said State, being a distance one hundred and forty-seven miles, more or less; and also all rolling-stock, equipment, and machinery connected or to be connected with said railroad, and all property, rights, and franchises held, or thereafter to be acquired, by said Cairo and St. Louis Railroad Company, its successors or assigns, including all the railways, ways, and rights of way, and all depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine-shops and other shops held or acquired, or which should be held or acquired, for use in connection with the said railroad, or in connection with the business thereof, and including also all locomotives, tenders, passenger, baggage, freight, and other cars, and all rolling-stock and equipment, and all machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or
84 replacing the said railroad or equipment, or appurtenances of the same, held or hereafter to be acquired by the said Cairo and St. Louis Railroad Company, and including also all franchises of the said Cairo and St. Louis Railroad Company connected with or relating to the said railroad, or to the construction, maintenance, or use thereof, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad and premises, or any part thereof, belonging or anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof, and also all estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said Cairo and St. Louis Railroad Company of, in, and to the same, and any and every part and parcel thereof, with the appur-

tenances, and also all books of account and vouchers kept and to be kept by said Cairo and St. Louis Railroad Company, and all other property whatsoever which the said Cairo and St. Louis Railroad Company held or should thereafter acquire.

III. That, for the purpose of constructing, operating, and maintaining the said railroad, to be constructed from East St. Louis or Illinoistown to Cairo, in said State of Illinois, the said Cairo and St. Louis Railroad Company, in pursuance of the powers and authority in it duly vested, issued and offered for sale a series of twenty-five hundred bonds, of one thousand dollars each, amounting in the aggregate to two million five hundred thousand dollars, bearing date on the second day of October, 1871, and payable in thirty years from the date thereof, in gold coin of the United States of America, at the city of New York, or, in British pounds sterling, at the city of London, England, and bearing interest at the rate of seven per centum per annum, payable semi-annually in the like gold coin, at the city of New York, or in British money, at the city of London, in England.

IV. That it was provided in said mortgage and deed of trust and in said bonds that if any default should be made in the payment of any half-yearly installment of interest on any of the bonds when such installment should become due and be demanded, and if such installment of interest should remain due and in arrear for the period of six months, then the principal of the bond, as well as the principal of each of the bonds of the series of which such bond was one, might be declared by the said trustee to be and thereupon should become due and payable immediately, notwithstanding that the time in each of said bonds limited for the payment thereof should not then have elapsed.

V. That it was further provided in and by said mortgage or deed of trust that said Cairo and St. Louis Railroad Company should, on or before the first day of May, in the year of of our Lord one thousand
85 eight hundred and seventy-three, pay over to the trustee, for the time being, under said indenture, the sum of twelve thousand and five hundred dollars, as and for the first installment of a sinking fund for the redemption and cancellation of said bonds, and should and would semi-annually thereafter, until the said bonds should become due and payable, or be redeemed, pay over to the said trustee the like sum of twelve thousand and five hundred dollars, and, in addition thereto, a further sum equal to six months' interest upon the aggregate amount of bonds which, up to the time of said payment, should have been redeemed through the said sinking fund.

VI. That it was in and by said mortgage or deed of trust further provided that in the event of a sale made by the said trustee of the said railroad and property, the purchase-money and proceeds of sale remaining after the payment of any prior liens, charges, and expenses should be applied to the payment of the principal of such of the said bonds as might be at that time outstanding and unpaid, and of the interest which should have accrued upon the said principal up to that time and be unpaid, with interest thereon, without discrimination or preference as between principal and interest, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

VII. That the said mortgage or deed of trust was duly recorded in the

offices of the proper officers in each of the counties in said State of Illinois wherein any of the said mortgaged property was or is situated, as follows, viz: in the office of the recorder of St. Clair County, Illinois, on the 26th day of February, A. D. 1872; in the office of the recorder of Monroe County, in said State, on the 22d day of February, A. D. 1872; in the office of the recorder of Randolph County, in said State, on the 23d day of February, A. D. 1872; in the office of the recorder of Jackson County, in said State, on the 24th day of February, A. D. 1872; in the office of the recorder of Union County, in said State, on the 24th day of February, A. D. 1872; in the office of the recorder of Alexander County, in said State, on the 26th day of February, A. D. 1872; and in the office of the recorder of Perry County, in said State, on the 10th day of May, A. D. 1873.

VIII. That the said twenty-five hundred bonds, duly certified under the signature of the president of said trustee company, were from time to time duly sold and negotiated and delivered to bona fide purchasers thereof for value, during the said year A. D. 1872, and that all of the same are now outstanding, and valid and subsisting obligations in the hands of divers persons, firms, and bodies corporate, who became and now are owners and holders thereof, and entitled to the moneys therein agreed to be paid, and to the security of said mortgage or deed of trust.

86 IX. That the said Cairo and St. Louis Railroad Company has made default in the conditions of the said mortgage or trust deed, and of said bonds; that the said defendant, the said Cairo and St. Louis Railroad Company, did not, on or about the first day of May, A. D. 1873, nor at any time thereafter, pay to the complainant (said Union Trust Company), as such trustee, or otherwise, the sum of twelve thousand five hundred dollars ($12,500), or any sum whatever, for the purpose of a sinking fund for the redemption and cancellation of said bonds.

X. That on or about the first day of October, A. D. 1873, a large number of the coupons or interest-warrants of said bonds, due and payable on said first day of October, A. D. 1873, were duly presented at the office of the complainant, The Union Trust Company of New York, in the city of New York, and payment of said coupons was duly demanded of said defendant, The Cairo and St. Louis Railroad Company, and was by said railroad company refused; that said defendant railroad company has also defaulted in the payment of each and every of the said semi-annual installments of interest, so promised and agreed by it to be paid, since the said first day of April, A. D. 1873; and that all such interest still remains due and unpaid; that the aforesaid default of said defendant, The Cairo and St. Louis Railroad Company, on said first day of October, A. D. 1873, and said several other defaults, respectively, up to and including the default on the said first day of April, A. D. 1877, each continued for more than six months after the said default in the payment of such interest as aforesaid, and had so continued for more than six months at the time of the filing of the bill of complaint in this cause, and still so continue, as do the defaults made in the payment of the semi-annual interest which has fallen due since the said first day of April, A. D. 1877.

XI. That after the expiration of said six months after said default on said first day of October, A. D. 1873, and said several other defaults, re-

spectively, in the payment of such interest, up to and including the default on the first day of April, A. D. 1877, and before the filing of the bill of complaint in this cause, the holders of said bonds, in respect of which there had been such continuous default, to the amount of upwards of five hundred thousand dollars ($500,000) of principal, in writing requested the complainant, The Union Trust Company of New York, to take appropriate legal proceedings to enfor'e the rights of the holders of said bonds, and to foreclose said mortgage or deed of trust, and that in pursuance of such request, said complainant filed the bill of complaint in this cause.

XII. That in consequence of said several defaults in the payment of the semi-annual installments of interest on said bonds, and the continuance of said several defaults for six months after demand of the same,
87 and pursuant to the provisions of said mortgage or deed of trust, The Union Trust Company of New York aforesaid, by an instrument in writing under seal, bearing date on the 8th day of November, A. D. 1877, declared the principal of each and all of said bonds to be due and payable immediately; and the court further finds and declares that the same thereupon became and was then and there due and payable, and that said declaration in writing was duly served upon said defendant, The Cairo and St. Louis Railroad Company, and the service thereof duly admitted in writing by said railroad company before the filing of the bill of complaint in this cause.

XIII. That by decree of this court, rendered on the 6th day of December, A. D. 1877, Henry W. Smithers was appointed receiver of said Cairo and St. Louis Railroad, and of all the property, assets, income, and revenue of the same, of every nature and kind; that said Henry W. Smithers, on the same day, gave bond and qualified as such receiver, and entered into the possession of said railroad, property, and assets, and upon his duties as such receiver, and has ever since remained in such possession and in the performance of such duties, and still so remains.

XIV. That there still remains unpaid of the interest due upon the aforesaid bonds, so secured by said mortgage or deed of trust, the following sums in gold coin, namely:

Interest due on the 1st day of October, 1873, $.
Interest due on the 1st day of April, 1874, $.
Interest due on the 1st day of October, 1874, $.
Interest due on the 1st day of April, 1875, $.
Interest due on the 1st day of October, 1875, $.
Interest due on the 1st day of April, 1876, $.
Interest due on the 1st day of October, 1876, $.
Interest due on the 1st day of April, 1877, $.
Interest due on the 1st day of October, 1877, $.
Interest due on the 1st day of April, 1878, $.
Interest due on the 1st day of October, 1878, $.
Interest due on the 1st day of April, 1879, $.
Interest due on the 1st day of October, 1879, $.
Interest due on the 1st day of April, 1880, $.
Interest due on the 1st day of October, 1880, $.
Interest due on the 1st day of April, 1881, $.

That interest is also due upon the respective amounts above mentioned,

from the respective days of maturity of said installments of interest, at the rate of seven per cent. per annum; and that the total amount of principal and interest due on said bonds and coupons, so secured by said
88 mortgage or trust deed, up to the day of May, A. D. 1881, is the sum of , and that the complainant is entitled to have said total amount, with interest thereon, paid into court for the benefit of the holders and owners of said bonds and coupons, and that in default of such payment, together with the costs of this proceeding, by the date hereinafter in this decree provided, said complainant is entitled to have said railroad, and all the property and assets of said railroad company, of every nature and kind, sold, as a whole and entirety, it being found by the court that the said railroad, and all the property and assets in connection therewith or belonging thereto or to the said railroad company, are incapable of being sold in separate parts or parcels, or in divisions, without material injury to their value, and that it will be for the best protection and advantage of all the creditors of said Cairo & St. Louis Railroad Company, as well as for the public, to preserve the unity of the said line and of all the property and assets in connection therewith or belonging to said defendant railroad company, and to make sale of said mortgaged property in such manner as will best preserve its entirety, while adequately preserving the lien of all according to their equitable priorities.

XV. And it is further found and determined by the court, from the proofs aforesaid, that all the allegations and averments of the said bill of complaint filed in this cause are true as therein stated and set forth, and that the equities are with the complainant in this cause; therefore it is now hereby ordered, adjudged, and decreed as follows, namely:

I. That unless the said Cairo & St. Louis Railroad Company, defendant herein, or one or more of the other defendants, shall on or before the day of , A. D. 1881, pay into this court in this cause, the said sum of being the amount due as aforesaid to the holders of said bonds and coupons secured by the mortgage or deed of trust aforesaid, with interest on said sum at the rate of six per cent. per annum, from and after the day of May, A. D. 1881, together with the costs of this cause to be taxed in that behalf, then the said railroad and other property, effects, rights, franchises, and assets aforesaid, shall be sold as hereinafter directed, and the equity of redemption of said defendant, the said Cairo & St. Louis Railroad Company, and of all the parties defendant to this cause, in and to the premises, property, and assets mentioned, conveyed, and referred to in said mortgage or deed of trust, and in and to all the property, effects, rights, franchises, and assets now in the possession or control of the said
89 Henry W. Smithers, receiver as aforesaid, shall be forever barred and foreclosed; that in case default shall be made in the payment of said sum of hereinbefore found and adjudged to be due to the holder of the said bonds and coupons, and interest thereon at the rate of six per centum per annum, from and after said day of May, A. D. 1881, together with the costs of this cause, to be taxed as aforesaid, then all and singular the railroad, property, and effects, rights, and franchises, of said Cairo and St. Louis Railroad Company shall be sold by John A. Jones, esq., the master in chancery of this court, as special commissioner, hereby appointed for such purpose (the court deeming that special reasons exist for his appointment); that said special commissioner shall make sale of the said railroad,

mortgaged property, effects, rights, and franchises of the said Cairo and St. Louis Railroad Company, and of all property and effects belonging to or connected with said railroad now in the possession or control of the said Henry W. Smithers, receiver as aforesaid, at public auction to the highest and best bidder or bidders therefor, in the city of Springfield, State of Illinois, at such place in said city and at such time or times as said special commissioner may appoint, having first given notice of the time, place, and terms of such sale, with a description of the property to be sold, by advertisement, to be published not less than once a week for six consecutive weeks in one daily newspaper published in each of the cities of New York, Chicago, and St. Louis.

II. And it is further ordered, adjudged, and decreed, that in case a sale of said mortgaged property shall be made under or in pursuance of the provisions of this decree, the said property shall be sold absolutely and without the privilege of redemption, free and clear and discharged from all contracts, leases, and agreements made by the said Cairo and St. Louis Railroad Company, with any person or persons, corporation or corporations, since the execution or delivery of said mortgage or deed of trust hereinbefore mentioned and set forth; but such sale shall be subject to all and every of the contracts or liens that have been made, executed, or created by said Henry W. Smithers, receiver as aforesaid, under and in pursuance of the authority granted by this court, and which contracts shall be binding upon and carried out by the purchaser or purchasers at such sale, and all persons or corporations holding by, through, or under said purchaser or purchasers; and such purchaser or purchasers, and any and all persons or corporations holding by, through, or under the same, shall be entitled to the benefit and advantages of any contracts made or entered into by said receiver, under the authority of this court, and which, at the time of such sale, shall remain in force and effect.

90 III. And it is further ordered, adjudged, and decreed that said sale shall be made subject to all sums legally due for taxes, which are or then shall be an absolute legal lien upon said property and effects, prior or paramount to the lien of said mortgage or trust deed. And the said sale shall also be made subject to the lien of all certificates or obligations issued by the said receiver in payment for rolling stock and equipment, secured upon such rolling stock and equipment, and which by the terms thereof are not yet due and payable, or payable on or before a fixed date, at the election of the receiver, the lien of which shall in no wise be affected or impaired by the sale made hereunder, but still remain a subsisting and paramount lien, as by the terms thereof. And the terms of such sale shall be as follows:

The sum of dollars, in cash, shall be paid to the said special commissioner by any accepted bidder at the time of sale. The remainder of the bid shall be paid at the time and place to be fixed by said special commissioner upon the confirmation of the sale by the court, either in money or in any of the bonds secured by the aforesaid mortgage or deed of trust, or partly in money and partly in bonds; in any case, the said bonds shall be taken as cash for such dividends as they would be entitled to from such bid.

The said special commissioner shall require from all bidders at the said sale, prior to the making of any bid, a deposit with him of the sum of one

hundred thousand dollars in money, or of five hundred thousand dollars at par in the bonds secured by the said mortgage or deed of trust upon said property as security for the bid in case the property should be struck off to such bidder or bidders, which deposit shall be absolutely forfeited to the uses of the trusts in favor of the complainant if the bidder or bidders so depositing the same shall fail to carry out his or their purchase, in accordance with the terms of sale and the order of this court, in case the property shall be struck off to him or them; and the said special commissioner shall make such further terms of such sale as may be usual, and as may be required by the complainant's solicitors.

The said special commissioner, upon receiving any of the said bonds or coupons, secured by the said mortgage or trust deed, in this decree described, on account of any purchase made as aforesaid, shall, if the bonds and coupons are taken at their full face value, with interest, cancel the said bonds and coupons; but if the said bonds and coupons are taken for any fractional part of their full value, then the said special commissioner shall stamp upon said bonds and coupons the amount or percentage thereof at which the same are so taken, and return the same to the owners
91 or holders thereof, who shall thereafter hold them solely for the portion thereof which shall not have been so paid through said sale.

IV. And it is further ordered, adjudged, and decreed that the said special commissioner make a report of the said sale to this court, and that upon confirmation thereof by this court, and the full payment of the whole of the purchase-money, the said John A. Jones, esq., as special commissioner as aforesaid, shall convey to the purchaser or purchasers at such sale, or their assigns, all and singular the said railroad and property of the said Cairo and St. Louis Railroad Company, and all acquired and in the possession of the said receiver, herein directed to be sold by him, by a good and sufficient deeds or deeds therefor, which said deed or deeds, when so made and delivered, shall vest in the grantee or grantees the right, title, estate, interest, property, and equity of redemption of, in, and to all and singular the real and personal estate, property, premises, and franchises therein described in fee simple forever, and shall entitle the said grantee or grantees to the possession thereof, and shall be a perpetual bar, both in law and equity, against any and every claim of said Cairo and St. Louis Railroad Company, and its successors and assigns, and against all and every person or corporation claiming or to claim the said railroad premises and property, appurtenances, franchises, rolling-stock and equipment, machinery, materials and supplies, or any part thereof, under or through the said Cairo and St. Louis Railroad Company, or any other party to this cause.

V. And it is further ordered, adjudged, and decreed that the said Henry W. Smithers, the receiver heretofore appointed in this cause as aforesaid, and now in possession of the said railroad, property, premises, appurtenances, and effects, shall, upon presentation to him of the said deed, deliver to the grantee or grantees therein named all and singular the said railroad, property, and effects, of whatever nature and kind, described in said deed, also choses in action, contracts, agreements, property, real and personal, acquired or held by said receiver, as such; but all monies in his hands and possession, as such receiver, and that may be so adjudged by this court upon the final settlement of his accounts as such receiver, shall not pass

by such sale, but shall be retained by said receiver, to be applied as may be ordered by this court. That any of the parties to this cause who may be in possession of the said property, premises, or effects, or any part thereof, and any person or corporation, who since the institution of this suit shall have come into possession of the same, shall deliver the possession thereof to the said grantee or grantees on the production of the said special commissioner's deed, and especially shall they deliver all books of account, records, legal or other papers, choses in action, claims, properties,
92 and fixtures of every nature, in his or their possession, or under his or their control, except that the receiver aforesaid shall not be required to surrender to such grantee or grantees the books and papers pertaining to his receivership accounts until his final settlement and discharge and until so ordered by this court.

VI. And it is further ordered, adjudged, and decreed that the said John A. Jones, esq., special commissioner, after retaining from the proceeds of the sale hereinbefore directed to be made the amount of his fees and expenses upon such sale for all services rendered and disbursements made by him in this cause, or in pursuance of the provisions of this decree hereinafter to be fixed by the court, if not agreed upon by the parties, shall forthwith pay out of the net proceeds as follows:

1st. The costs of this suit, including clerk's fees and all other disbursements in this cause, to be taxed in favor of the solicitors of complainant herein.

2d. Out of the surplus, if any, to pay to Henry W. Smithers, receiver, any sums of money that may be due and owing to him, over and above the funds in his hands, on account of the operation and maintenance of said railroad, including all attorneys' and counsel fees incurred by him, and compensation to all attorneys, solicitors, and counsel for services rendered to such receiver in the prosecution or defense of any suits or proceedings brought by or against him, or prosecuted or defended by him, as such receiver.

3d. Out of the surplus, if any, to pay into the registry of this court such sum as the court shall hereafter and before the confirmation of the sale direct, out of which there shall be paid the principal and interest of any outstanding receiver's certificates of indebtedness authorized by this court, and also any and all claims against said receivership, and any and all claims against said railroad or property, or any part thereof, that may be allowed against the same or directed to be paid by this court upon the final hearing in respect thereto.

4th. Out of the surplus, if any, to pay to the complainant, The Union Trust Company of New York, trustee in the aforesaid mortgage or deed of trust, its proper compensation for its services under said mortgage or deed of trust, and for its disbursements, other than counsel fees, incurred in and about the said mortgage or deed of trust and the institution and prosecution of this suit; and also to pay to said trustee the amount of counsel fees incurred by it as such trustee, in the institution and prosecution of this cause, the amount so paid to be applied by such trustee to the payment of such counsel fees and any proper disbursements of said
93 counsel, all of said amounts to be such as shall be hereafter determined by this court.

5th. Out of the surplus, if any, to pay to the holders of the bonds and

coupons, secured by said mortgage or deed of trust, the amount of said bonds and coupons and the interest thereon hereinbefore adjudged to be due, with interest at the rate of six per centum per annum to the time of said sale; and in case there shall not be enough to pay them in full, then such surplus, if any, shall be distributed and paid pro rata between the holders of the said bonds secured by said mortgage or deed of trust and of the coupons thereof, without discrimination between principal and interest.

6th. The surplus, if any, which remains after the payments aforesaid shall be paid into this court, for distribution under the further order of this court.

VII. The description of the property and effects, the sale of which is hereby ordered, is as follows:

All and singular the railroad of said Cairo and St. Louis Railroad Company, known as the Cairo and St. Louis Railroad, extending and constructed from the city of Cairo, in Alexander County, Illinois, to the city of East St. Louis, or Illinoistown, in St. Clair County, in said State, being a distance of one hundred and forty-seven miles, more or less; and also all rolling-stock, equipment, and machinery connected with said railroad, and all property, rights, and franchises held, owned, or acquired by said Cairo and St. Louis Railroad Company, its successors or assigns, including all the railways, ways, and rights of way, and all depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine-shops and other shops held, owned, or acquired for use in connection with the said railroad, or in connection with the business thereof, and including also all locomotives, tenders, passenger, baggage, freight, and other cars, and all rolling-stock and equipment, and all machinery, tools, implements, fuel, and material for constructing, operating, repairing, or replacing the said railroad, or equipment or appurtenances of the same, held, owned, or acquired by the said Cairo and St. Louis Railroad Company, and including also all franchises of the said Cairo and St. Louis Railroad Company connected with, or relating to, the said railroad, or to the construction, maintenance, or use thereof, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad and premises, or any part thereof, belonging or anywise appertaining, and the reversion
94 and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof, and also all estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said Cairo and St. Louis Railroad Company of, in, and to the same, and any and every part and parcel thereof, with the appurtenances, and also all books of account and vouchers kept by said Cairo and St. Louis Railroad Company, and all other property whatsoever which the said Cairo and St. Louis Railroad Company owns, holds, or has acquired; also, all property and assets, real, personal, and mixed, of every nature and kind which have been acquired by the said receiver since his appointment, for the benefit of, or that are, or are to be, used in connection with said railroad or other property so mortgaged as aforesaid.

VIII. And it is further ordered, adjudged, and decreed that the bonds secured by the aforesaid mortgage or deed of trust, duly identified and delivered to William F. Whitehouse, esq., and James T. Jones, esq., here-

tofore appointed by this court as special commissioners to take proof of the identity of the bonds and coupons secured by said mortgage or deed of trust, to be used as part payment of any amount bid at any sale made under this decree, and which special commissioners were required to report thereon to this court (and which commissioners have filed their report in this court so identifying said bonds and coupons) that such bonds and coupons shall be allowed as part payment of such bid to the extent of their net value under such sale, as in this decree provided.

IX. And it is further ordered that this cause is hereby retained for the purpose of receiving the report of the special commissioner appointed by this decree to make sale of said railroad property, and for the purpose of settling the accounts of the receiver, and of adjudicating and disposing of the intervening claims pending in this court, for making such orders as may be necessary for the preservation and management of the mortgaged premises and property pending a sale and conveyance thereof; likewise for the purpose of distributing the proceeds of sale and moneys derived from the operation of the road, and for all other orders and decrees herein which may be necessary in relation to matters already pending not herein disposed of.

Any party to this cause may apply to this court, upon the foot of this decree, for such further orders and decrees as may be necessary.

95 *Report of sale.*

In the circuit court of the United States, in the southern district of Illinois.

THE UNION TRUST COMPANY OF NEW YORK compl't, *v.* THE CAIRO & ST. LOUIS RAILROAD COMPANY et al., def'ts. } In equity.

The undersigned, John A. Jones, special commissioner appointed by said court, and charged with the duty of making the foreclosure sale in said decree provided, respectfully reports that, pursuant to the terms of said decree, he gave public notice that he would sell at public auction the railroad and property as described in the said decree, and upon the terms and conditions in the same set forth and described, at the front (being the north) door of the United States court-house building, in the city of Springfield, State of Illinois, at ten o'clock in the forenoon of Thursday, the fourteenth day of July, A. D. 1881, by publishing the same in The Daily Indicator, a daily newspaper of general circulation, printed and published in the city of New York, State of New York; also by publishing the same in the Chicago Daily News, a daily newspaper of general
96 circulation, printed and published in the city of Chicago, State of Illinois; also by publishing the same in The Evening Chronicle, a daily newspaper of general circulation, printed and published in the city St. Louis, State of Missouri; that said publications of notice in said newspapers were made once a week for six consecutive weeks in each of said newspapers, the first insertion of which said publications in each of said newspapers was more than six weeks before the said fourteenth day of July, 1881, said publications of notices being in all respects according to

the provisions of said decree of sale made by said court on the 16th day of May, A. D. 1881; and that after having given said notices and pursuant thereto the undersigned attended in person at the city of Springfield, State of Illinois, and at the front (being the north) door of the United States court-house building, at ten o'clock in the forenoon of Thursday, July 14th, 1881, in the presence of the solicitor and representatives of parties in interest, and did then and there at public outcry offer and expose to sale,
upon the terms and provisions of said decree, the said property
97 in said decree and notices described, and read by the undersigned in
the hearing of the persons so assembled, to wit, all and singular the following-described railroad property, effects, rights, and franchises, to wit, all and singular the railroad of said Cairo and St. Louis Railroad Company, known as the Cairo and St. Louis Railroad, extending and constructed from the city of Cairo, in Alexander County, Illinois, to the city of East St. Louis, or Illinoistown, in St. Clair County, in said State, being a distance of one hundred and forty-seven miles, more or less, and also all rolling-stock, equipment, and machinery connected with said railroad, and all property, rights, and franchises held, owned, or acquired by said Cairo and St. Louis Railroad Company, its successors or assigns, including all the railways, ways, and rights of way, and all depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine-shops and other shops held, owned, or required for use in
98 connection with the said railroad or in connection with the business
thereof, and including also all locomotives, tenders, passenger, baggage, freight, and other cars, and all rolling-stock and equipment, and all machinery, tools, implements, fuel, and material for constructing operating, repairing, or replacing the said railroad or equipment, or appurtenances of the same held, owned, or acquired by the said Cairo and St. Louis Railroad Company, and including also all franchises of the said Cairo and St. Louis Railroad Company connected with or relating to the said railroad or to the construction, maintenance, or use thereof, together with all and singular the tenements, hereditaments, and appurtenances to the said railroad and premises, or any part thereof, belonging or anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues, and profits thereof, and also all estate, right title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said Cairo and St. Louis Railroad Company of, in, and to the same and any and every part and parcel thereof, with the appurtenances, and also all books of account and vouchers kept by said
99 Cairo and St. Louis Railroad Company, and all other property
whatsoever which the said Cairo and St. Louis Railroad Company owns, holds, or has acquired; also all property and assets, real, personal, and mixed, of every nature and kind, which have been acquired by the said receiver since his appointment for the benefit of, or that are, or are to be, used in connection with said railroad or other property so mortgaged as aforesaid. The said property will be sold absolutely and without the privilege of redemption, free and clear, and discharged from all contracts, leases, and agreements made by the said Cairo and St. Louis Railroad Company since the execution and delivery of the mortgage or deed of trust in said

decree described, but subject to all contracts or liens made, executed, or created by Henry W. Smithers, receiver in said cause, in pursuance of authority granted by said court, all which contracts and liens shall be binding upon and carried out by the purchaser at such sale, such purchaser being also entitled to the benefit of any contract made by the said Smithers, as receiver, under the authority of said court, which shall
100 at the time of such sale remain in effect. Such sale will further be made subject to all sums legally due for taxes, and which shall then be a lien and subject to the lien of all certificates or obligations issued by the said receiver, in payment for rolling stock and equipment, secured upon such rolling stock, and equipment, and which by the terms thereof are not yet due and payable, or payable on or before a fixed date, at the election of the receiver, which lien shall in no wise be affected by such sale, but remain a subsisting and permanent lien as by the terms thereof. The terms of sale are as follows: The sum of one hundred thousand dollars ($100,000) in cash shall be paid to the undersigned, said special commissioner, by any accepted bidder, at the time of sale, and the remainder of the bid at the time and place to be fixed by the said special commissioner, either in money or in any of the bonds, secured by the mortgage or deed of trust referred to in said decree, or partly in money and partly in said bonds; in any case, the said bonds being taken as cash for such dividends as they would be entitled to from such bid under the provisions
101 of such decree. In the event that such deposit is not made instanter, the undersigned, as such special commissioner, will forthwith make a resale of the said railroad and property without adjournment or postponement; and said deposit will be so absolutely forfeited, if the bidder or bidders so depositing fail to carry out his or their purchase as in said decree provided. And the undersigned did, after reading the said description, announce the terms of sale as fixed by the said decree. And the undersigned, as such special commissioner, did thereupon then and there offer and expose to sale as aforesaid all of said property in said notices and decree described and ordered to be sold, and every part and parcel thereof as an entirety, as commanded by said decree, and thereupon Josiah A. Horsey and Charles J. Canda did bid for the same the sum of four millions of dollars, and such bidders having in all respects complied with the said terms of sale, no one bidding more, and that being the highest and best bid received for the same, said property was thereupon
102 openly struck off and sold to them for the price aforesaid.

And the said purchasers did at the time of such sale pay to the undersigned in cash the sum of one hundred thousand dollars, which sum was received by the undersigned and is held by him on account of the consideration money as required by the said decree. All of which is respectfully submitted this 14th day of July, A. D. 1881.

JNO. A. JONES,
Special Commissioner.

(Indorsed:) Filed July 14, 1881. J. A. Jones, clerk.

Petition of E. E. Souther & Bro.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court, January term, 1878.

IN THE MATTER OF THE CAIRO & ST. LOUIS RAILROAD COMPANY. } In chancery.

To the honorable the judges of said court sitting in chancery;

Your petitioners, Eustace E. Souther and Warren A. Souther,
103 partners, doing business at St. Louis, in the State of Missouri, under the firm name of E. E. Souther & Bro., respectfully represent unto your honors that by the decree of your honorable court, rendered on the 6th day of December, A. D. 1877, in the suit of The Union Trust Company of New York against The Cairo and St. Louis Railroad Company, one Henry W. Smithers was appointed receiver of all and singular the railroad and other property of said railroad company, and by the terms of the order appointing said receiver, among other things, it was ordered "that said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railway company for labor and supplies that may have accrued in the operation and maintainance of said railroad property within six months immediately preceding the rendition of this decree." That said Smithers afterwards duly qualified as such receiver and entered into and now has the full and complete pos-
104 session of the said railroad and all the corporate property of said railroad company, and is now operating and managing the same as such receiver by and under the directions of this honorable court.

That your petitioners are, and for a long time past have been, engaged in dealing in iron, of the usual character sold by such dealers, and that within six months before the rendition of the aforesaid decree by this court they bargained and sold to the said railroad company, by contract with the officers of said company, a quantity of iron for the use of said company, the first bill of which amounted to the sum of two hundred and ninety-nine dollars and forty-one cents ($291.41), and the second bill of which amounted to the sum of two hundred and thirty-two dollars and seventy-three cents ($232.73), for which said amounts the said company, on the 12th day of October, 1877, gave to your petitioners the promissory note of said railroad company for said first bill of iron aforesaid due and payable ninety days after the date thereof, and a like promissory note for said second bill of iron, dated November 25th, 1877, and due and
105 payable ninety days after the date thereof, both which said notes are now held and owned by your petitioners and are due and wholly unpaid.

They further represent that the last item of said first bill of iron was furnished by your petitioners and delivered to said company on the 11th day of September, 1877, and that the second bill of iron as aforesaid was furnished and delivered as aforesaid, all during the month of October,

1877, and that all said material thus furnished and delivered by your petitioners was actually used by said company in the maintainance and operation of their said railroad, and which is situated wholly within the southern judicial district of the State of Illinois; that under the facts herein set forth your petitioners claim that under the laws of said State of Illinois in such cases made and provided they are entitled to a lien on all said railroad, and upon all the property, real, personal, and mixed of said railroad company, and that they are likewise entitled by the laws aforesaid to be paid for the said materials so furnished by them and delivered to said company as part of the current expenses of said railroad; that said
106 company is wholly insolvent, and fails and refuses to pay your petitioners the amount so due them as aforesaid; that by reason of the appointment by this court of the said receiver and the taking possession of said property by said receiver and the holding the same under the orders of this court and its control thereof, your petitioners are and have become unable to commence any suit for the enforcement of their said lien against the property aforesaid of the said railroad company in any of the courts of said State of Illinois having jurisdiction of said claims, and are therefore obliged to bring this suit in your honorable court for the establishment and enforcement of said lien and for which purpose they ask to be allowed to intervene in the said suit of the said Union Trust Company of New York against said company; that they be allowed to make said Cairo and St. Louis Railroad Company, said Union Trust Company of New York, and said Henry W. Smithers, receiver as aforesaid, defendants hereto; that all said defendants be required to answer this petition by a short day to be appointed for that purpose, and that upon the hearing hereof your honors will order and decree that the lien of your pe-
107 titioners upon all the property aforesaid of said company for such of money as shall be due them for and on account of such materials aforesaid, and so furnished and delivered said company be established, and that said defendants, or some of them, may be ordered and compelled to pay your petitioners any sum so found due to them as aforesaid, as well the costs and charges of this proceeding, and they also pray for such other and further relief in the premises as the nature of their case may require, and as shall be agreeable to equity and good conscience, &c. They file herewith a copy of the bill of goods so furnished and delivered by them to said railroad company.

EUSTACE E. SOUTHER,
WARREN A. SOUTHER,
Petitioners.

ROBINSON, KNAPP & SHUTT,
Sol'rs for Pet'rs.

(Indorsed:) Filed March 9, 1878. J. A. Jones, clerk.

108 [E. E. Souther, W. A. Souther. Terms cash. St. Louis or New York funds.]

SAINT LOUIS, *Jan.* 25, 1878.

Cairo & St. Louis R. R. bought of E. E. Souther & Bro., dealers in iron, steel, and nails, specialty of boiler and tank plates, sheets, rivets, angle bars, of all shapes and sizes, small T rails and spikes, boiler tubes and expanders, punches and shears, U. S. plate and bar iron, Nos. 932, 934, & 936 North Second street:

1877.		*Lbs.*	*C.*	
Aug. 2d.	1 sheet 84″ x 28″ x 24 flange iron	174	6	10 44

	2 bars 1⅛″ angle "	114	4.4	5	02
	Drayage				25
" 4th.	20 bars 1⅛ round iron	716			
	30 " 1″ " "	978			
		1,694	2.2	37	26
	3 bdls. 2 x ¼ "	460	2.4	11	04
	4 " 3 x ⅛ "	549			
	4 " 4 x ⅛ "	421			
		970	2.5	24	25
	1 keg 1¼ x ⅝ x $\frac{11}{16}$ nuts	200	3.25	6	50
	Drayage			1	00
" 13th.	25 iron follower plates 6 x 1, 1⅝ Hall	334	3.75	12	52
	½″ x ½″ rivets.	50			
	⅝″ x ¼″ "	50			
		100	10	10	00
	2 bdls. 2 x $\frac{3}{16}$	207	2.7	5	59
	Drayage				50
" 18th.	6 sheets 96 x 26 4⅝ 18 iron	193	3.5	6	76
	18 bars 2 x ½	832	2.2	18	30
	2 bdls. 1 x ½	208	2.4	4	99
	2 " ½″ round	222	2.6	5	77
109	Drayage				50
"	23. 2 each #1 & #2 Warren's tuyer irons		3.25	13	00
	1 bdl. #243 sheet-iron	132	4	5	28
	Drayage				50
Sept. 1st.	4 bales ½″ round iron	450	2.6	11	70
	4 " ⅝″ " "	438	2.4	10	51
	2 " ¾″ " "	208	2.3	4	78
	1 " ⅜″ square "	17	2.8		47
	12 bars 1$\frac{15}{16}$ round "	859			
	12 " 2½ x ⅝ "	760			
		1,619	2.2	35	62
	1 bdl. 1¼ half oval "	105	2.9	3	05
	4 sheets #183 iron	190	3.5	6	65
	Drayage			1	00
" 11th.	1 bdl. 1¼ x ⅛	128	2.9	3	71
	1 " #22 B iron	142	3¾	5	33
	3 kegs, each 10d., 30d. & 40d. nails		2.5	22	50
	3 " 8d. "		2.75	8	25
	Drayage				50
				293	54
	Interest added @ 8%			5	87
	Settled Oct. 16, by note dated Oct. 12, @ 90 days			$299	41

(Indorsed:) Filed March 9, 1878. J. A. Jones, clerk.

110 *Cairo & St. Louis R. R. to E. E. Souther & Bro.*

1877.					
Oct. 1.	8 bars 1⅛ round iron	225	2.2	4	95
	4 bdls. ⅞ " "	387			
	4 " ¾ " "	425			
		812	2.3	18	66
	2 bars 2¼ " "	404			
	6 bdls. ⅞ " "	666			
		1,070	2.4	25	68
	3 " ½ " "	323	2.6	8	40
	Drayage				50
9th.	12 bars 1¼″ " "	580			
	12 " 1⅛ " "	496			
	12 " 2 x $\frac{13}{16}$ "	399			
	6 " 3 x $\frac{13}{16}$ "	287			
	6 " 3 x ½ "	382			
		2,144	2.2	47	17
	2 bdls. $\frac{13}{16}$ round "	214	2.4	5	14
	2 " ⅞ " "	215	2.6	5	59
	2 " ¾ " "	228	2.8	6	38
	2 " 1 x ½ " "	226	2.4	5	42

	Drayage				1 00
11th.	2 slabs 12″ x $\frac{3}{16}$″ iron	194	$3\frac{3}{4}$	7	27
15th.	6 bars 2 x $1\frac{1}{4}$ "	576	2.6	14	98
16th.	2 " 2″ square "	355	2.4	8	52
	3 bdls. $\frac{3}{4}$″ round "U. S." iron	339	7.1	24	07
	2 $\frac{5}{8}$″ " " " "	211	7.2	15	19
	Drayage				50
17.	5 sheets $\frac{1}{4}$18 B iron	166	3.5	5	81
	2 bdls. $\frac{1}{4}$243 "	270	4	10	80
	Drayage				50
			c.		
27.	1 bar $6\frac{1}{2}$ x 1″ iron cut for follower plates	262	$4\frac{1}{2}$	11	14
	Drayage				50
				228	17
	Interest added @ 8%			4	56
	Settled by note Nov. 25th, @ 90 days			232	73

(Indorsed:) Filed March 9, 1878. J. A. Jones, clerk.

111 $299.41.] ST. LOUIS, *Oct. 12th*, 1877.

Ninety days after date the Cairo and St. Louis Railroad Co. promise to pay to the order of E. E. Souther & Bro. two hundred & ninety-one $\frac{41}{100}$ dollars for value received.

THE CAIRO & ST. LOUIS R. R. CO.,
By F. E. CANDA, *President.*

No. 205. Due Jan. 10–13, '78.

(On margin, indorsed:) W. S. Searls, treasurer Cairo & St. Louis R. R. Co.

(Indorsed:) Filed March 9, 1878. J. A. Jones, clerk.

$232.73.] SAINT LOUIS, MO., *Nov. 25th*, 1877.

Ninety days after date the Cairo & St. Louis Railroad Co. promise to pay to the order of E. E. Souther & Bro. two hundred & thirty-two $\frac{73}{100}$ dollars for value received.

THE CAIRO & ST. LOUIS R. R. CO.,
By F. E. CANDA, *President.*

No. 213. Due Feb. 213–26, '78.

(On margin, indorsed:) W. S. Searls, treasurer Cairo & St. Louis R. R.

(Indorsed:) Filed March 9, 1878. J. A. Jones, clerk.

112 *Answer of receiver.*

United States circuit court, southern district of Illinois.

THE UNION TRUST COMPANY
vs.
THE CAIRO & ST. LOUIS RAILROAD CO.

The answer of H. W. Smithers, rec'r, to the petition of E. E. Souther & Brother, respectfully shows that as he is informed and believes that there

is due said petitioners for supplies furnished to the Cairo & St. Louis Railroad Company, within six months prior to the decree of December 6th, 1877, the sum of five hundred and thirty-two and $\frac{14}{100}$ dollars, which said sum should be paid in accordance with the terms of the decree of Dec. 6th, 1877, in relation to amounts due and owing by said railroad company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of said decree.

HENRY W. SMITHERS, *Rec'r*, &
By JUDD & WHITEHOUSE, *His Sol'rs.*

JUDD & WHITEHOUSE,
Sol'rs for Rec'r C. & St. L. R. R.

(Indorsed:) Filed May 13, 1878. J. A. Jones, clerk.

113 *Affidavit of E. E. Souther.*

STATE OF MISSOURI,
County of St. Louis:

E. E. Souther, a resident of said county and State, being first duly sworn according to law, says that he is a member of the firm of E. E. Souther & Bro., and that the items, dates, prices, and amounts shown in a certain bill of account of said firm against the Cairo and St. Louis R. R. Company, which is filed in the office of the clerk of the United States circuit court for the southern district of Illinois, with the petition of said firm, in the cause of the Union Trust Company of New York against said railroad company, are true and correct; that the supplies therein named were actually furnished and delivered to said company upon the order of their properly appointed agent; that the amount of said account remains due and unpaid; that the notes hereto attached were given for said goods as furnished, as aforesaid, at the dates thereof, and that the same are wholly unpaid.

E. E. SOUTHER.

Sworn to and subscribed before me this 23rd day of April, A. D. 1878. Witness my hand and official seal.

[L. S.] GEO. H. SOUTHER,
Notary Public.

(Indorsed: Filed May 16, 1878. J. A. Jones, clerk.

114 *Copy of note.*

(Copy.)

$232.73.] SAINT LOUIS, MO., *Nov, 25th*, 1877.

Ninety days after date the Cairo and St. Louis Railroad Co. promise to pay to the order of E. E. Souther & Bro. two hundred and thirty-two $\frac{73}{100}$ dollars for value received.

(Signed) THE CAIRO & ST. LOUIS R. R. CO.,
By F. E. CANDA, *President.*

(Endorsed on back:) W. S. Searls, treasurer Cairo & St. Louis R. R. Co.

Copy of note.

(Copy.)

$299.41.] ST. LOUIS, *Oct.* 12*th*, 1877.

Ninety days after date the Cairo and St. Louis Railroad Co. promise to pay to the order of E. E. Souther & Bro. two hundred & ninety-nine $\frac{4}{100}$ dollars, for value received.

THE CAIRO & ST. LOUIS R. R. CO.,
By F. E. CANDA, *President.*

(Endorsed on back:) W. S. Searls, treasurer of Cairo & St. Louis R. R. Co.

(Indorsed:) Filed May 16, 1878. J. A. Jones, clerk.

115 *Decree.*

In the circuit court of the United States for the southern district of Illinois.

THURSDAY, *May* 16*th*, *A. D.* 1878.

Present Hon. Samuel H. Treat, district judge.

THE UNION TRUST COMPANY OF NEW YORK
v.
THE CAIRO & ST. LOUIS RAILROAD COMPANY. } In chancery.

In the matter of the intervening petition of E. E. Souther & Bro.

And now on this 16th day of May, A. D. 1878, come the said petitioners by Robinson, Knapp & Shutt, their solicitors, and the answer of the receiver herein to the petition of said E. E. Souther & Bro. having been filed, whereby it appears that said petitioners have heretofore and within six months prior to the decree of Dec'r 6th, 1877, furnished to the said defendant above named iron supplies according to the bill of items thereof attached to said petition to the amount of five hundred and thirty-two dollars & fourteen cents. It further appearing to the court that
116 for said goods thus furnished, the said defendant, on the 12th day of October, 1877, gave to said petitioners the promissory note of said defendant dated the day and year last aforesaid, for the sum of two hundred and ninety-nine dollars and forty-one cents, due and payable ninety days after the date thereof, and that on the 25th day of November, A. D. 1877, said defendant also gave their promissory note to the said petitioners for the sum of two hundred and thirty-two dollars and seventy-three cents, due and payable in ninety days after the date thereof, and both which sums of money, and in the aggregate making the sum first herein mentioned, were for the price of supplies and materials furnished by the said petitioners to the said defendant and used by it in the operation and maintainance of its said railroad, and which said sum remains wholly unpaid. It further appearing to the court that under the statutes of the State of Illinois in such cases made and provided the said petitioners, E. E. Souther & Bro., have and are entitled to a lien upon all the property of said de-

fendant now in the hands of the receiver to secure the payment of
117 said amount. It is therefore ordered and decreed by the court that the said claim of said E. E. Souther & Bro. be preferred over and before all other claims against said defendant allowed by this court and ordered to be paid by said receiver, except claims heretofore passed upon by this court and in which a like lien has been decreed and established; and it is further ordered that said receiver pay to said E. E. Souther & Bro., out of the first money coming to his hands above the running expenses of the said railroad and before any improvements or ameliorations are made upon the property in his hands as such receiver, and after satisfying any prior similar orders to this, the said sum of five hundred and thirty-two dollars and fourteen cents ($532.14), with interest thereon according to the tenor and effect of said promissory notes, and that he also pay the costs of this matter.

118 *Motion to set aside decree.*

In the circuit court of the United States for the southern district of Illinois.

WEDNESDAY, *June 5th, A. D.* 1878.

Present, Hon. Samuel H. Treat, district judge.

UNION TRUST COMPANY OF NEW YORK
v.
CAIRO AND ST. LOUIS RAILROAD COMPANY. } In chancery.

In the matter of the intervening petition of E. E. Souther & Bro.

Now comes the said The Union Trust Company of New York, complainants in the above-entitled cause, by Judd and Whitehouse, its solicitors, and moves the court to set aside the order entered May 16th, 1878, in the matter of the intervening petition of E. E. Souther & Bro.

119 *Motion by receiver to vacate decree of May* 16, '77.

In the circuit court of the United States for the southern district of Illinois.

WEDNESDAY, *June 5th, A. D.* 1878.

Present, Hon. Samuel H. Treat, district judge.

UNION TRUST COMPANY OF NEW YORK
vs.
CAIRO AND ST. LOUIS RAILROAD COMPANY. } In chancery.

In the matter of the intervening petition of E. E. Souther & Bro.

And now comes Henry W. Smithers, receiver in the above-entitled cause, by Judd and Whitehouse, his solicitors, and moves the court here so to modify the order entered on the 16th day of May, A. D. 1877, in

the matter of the intervening petition of E. E. Souther & Bro., that the same may accord with the decree entered herein December 6th, A. D. 1877, appointing the said Henry W. Smithers receiver of said railroad.

120 *Decree vacating decree of May 16, '78, with leave to answer.*

In the circuit court of the United States for the southern district of Illinois.

FRIDAY, *September 8th, A. D.* 1882.

Present, Hon. Samuel H. Treat, district judge.

THE UNION TRUST COMPANY OF NEW YORK
v.
THE CAIRO AND ST. LOUIS RAILROAD COMPANY et al. } In chancery.

In the matter of the intervening petition of E. E. Souther & Bro.

And now this cause coming on again to be heard in the matter of the intervening petition of E. E. Souther and Brother upon the motion of the complainant, The Union Trust Company of New York, entered herein on the fifth day of June, A. D. 1878, to vacate and set aside the order or decree rendered herein in said matter on the sixteenth day of May, A. D. 1878; and the court now having heard the argument by Mr. S. Corning Judd, of counsel for said complainant, The Union Trust Company
121 of New York as aforesaid, and by Mr. Thomas C. Mather, of counsel for the said intervening petitioners, and being now fully advised and satisfied in the premises, it is hereby ordered, adjudged, and decreed that the said order or decree so entered herein on the said sixteenth day of May, A. D. 1878, allowing said claim and ordering the payment thereof as specifically provided in said order or decree, be, and the same is hereby vacated and set aside, and counsel for the petitioners herein now except to this order. Whereupon the complainant, by its counsel aforesaid, asks leave to answer the intervening petition of the said E. E. Souther and Brother filed in this cause as aforesaid, which motion is allowed, and it is accordingly ordered that said complainant have leave to file its answer to such intervening petition.

122 *Answer of the Union Trust Co.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of E. E. Souther & Bro.

The separate answer of The Union Trust Company of New York, com-

plainant in the above-entitled cause, to the intervening petition of E. E. Souther & Bro. aforesaid. This respondent now and at all times hereafter saving and reserving to itself the benefit of all objections that may be had or taken to the said petition, and the matters therein contained, for the many uncertainties, irregularities, and insufficiencies therein contained (and expressly denying all equity on the face thereof), for answer thereunto or to so much and to such parts thereof as it is advised by its counsel that it is material to make answer unto, answering admit
123 upon information and belief that there is due to the said petitioners for supplies furnished to the Cairo and St. Louis Railroad Company, within six months prior to the decree of December 6th, 1877, the sum of five hundred and thirty-two dollars and fourteen cents ($532.14). And this respondent, further answering, say that for more than four years before the 6th day of December, 1877, nothing whatever was paid by said Cairo and St. Louis Railroad Company, either upon the principal or interest of the mortgage indebtedness mentioned in the bill of complaint in the above-entitled cause, although said company defaulted in the payment of their interest coupons mentioned in said bill of complaint, falling due October 1st, 1873, and in the payment of all the coupons falling due since that time, and which are secured by the mortgage or deed of trust mentioned and referred to in the said bill of complaint; nor has there been any payment whatever on either the principal or interest of the indebtedness secured by the mortgage or trust deed mentioned in said bill of complaint since said 1st day of October, 1873; so this respondent says that no portion of the gross income or of any of the assets of said rail-
124 road company during the period of more than four years prior to said 6th day of December, 1877, was paid to or for the benefit of the holders or owners of said indebtedness so secured by said mortgage or trust deed. And this respondent, further answering, says that no portion of the gross income of said Cairo and St. Louis Railroad Company for a period of more than four years prior to said 6th day of December, 1877, was used or paid out otherwise than for the necessary and ordinary current expenses in operating the road of said company, and in keeping the same in necessary repair for safety in operating the same, nor, as respondent is informed and believes, was anything whatever paid out of the earnings or income of said railroad company for lasting and valuable improvements for a period of more than four years prior to said 6th day of December, 1877, which ought in equity to have been employed or paid out for labor or supplies; nor, as respondent is informed and believes, and therefore charges the truth to be, way any of the indebtedness mentioned in
125 the petition created or incurred otherwise than for supplies furnished in the necessary ordinary operating and managing expenses of said railroad, and in making ordinary repairs on said railroad necessary to safety in the use and operation thereof; and so this respondent says there was no diversion of any of the earnings or income of said railroad company to or for the benefit of the mortgage creditors secured by said mortgage or trust deed aforesaid for the period of more than four years prior to said 6th day of December, 1877.

And now, having fully answered, this respondent prays to be dismissed hence with its reasonable costs in this behalf most wrongfully sustained, &c.

THE UNION TRUST COMPANY OF NEW YORK,
By JUDD & WHITEHOUSE,
Sol'rs and of Counsel for Resp'd't.

(Indorsed:) Filed September 8, 1882. J. A. Jones, clerk.

126 *Decree of September* 19, 1882.

In the circuit court of the United States for the southern district of Illinois.

TUESDAY, *September 19th, A. D.* 1882.

Present, Hon. Thomas Drummond, presiding judge, Hon. Samuel H. Treat, district judge.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of E. E. Souther & Bro.

This cause now coming on again to be heard in the matter of the intervening petition aforesaid, the answer thereto of the complainant in this cause (The Union Trust Company of New York) filed herein, upon the deposition of Henry W. Smithers, read herein in open court, and upon the stipulation between the parties, read in evidence, the complainant being represented by its counsel, Messrs. Judd & Whitehouse, and the intervening petitioner aforesaid being represented by their counsel, Mr.
127 Thomas C. Mather, and the court having considered the matter and heard the argument of counsel for the respective parties, and being now fully advised in the premises, doth find that there is due to the said intervening petitioners, E. E. Souther & Bro., for supplies furnished to the Cairo and St. Louis Railroad Company within six months prior to December 6th, A. D. 1877, the sum of five hundred and thirty-two dollars and fourteen cents ($532.14), and (the opinion of the judges being opposed upon certain points involved, as set forth in a certificate of division this day filed and entered of record in this cause, but the opinion of the presiding judge prevailing), therefore, on motion, of the petitioners by their counsel aforesaid, it is hereby ordered, adjudged, and decreed that the said petitioners are entitled to the payment of their claim so found due, to wit, the sum of five hundred and thirty-two dollars and fourteen cents ($532.14), as a lien upon the property and assets of the said Cairo and St. Louis Railroad Company, or the proceeds of the sale thereof, par amount to the indebtedness secured by the mortgage or deed of trust referred
128 to in the bill of complaint in this cause, and further that the said sum of five hundred and thirty-two dollars and fourteen cents ($532.14), with interest from this date, shall be paid over to the petitioners out of the money now in the registry of this court, or that may hereafter be paid into the registry of this court, arising from the proceeds of the sale of the premises and property referred to in the bill of

complaint herein, and that the complainant in this cause (The Union Trust Company of New York) pay the costs herein expended, to all of which rulings and orders in this decree the said complainant, The Union Trust Company of New York, by its counsel, now here objects and excepts. And the said complainant, by its counsel, Judd and Whitehouse, prays an appeal to the Supreme Court from this decree and accordingly, and the petitioners except to the ruling of the court denying interest prior to the entry of this decree.

And it is further ordered, adjudged, and decreed that the said appeal be and is hereby granted and allowed, the appeal bond to be in the penal sum of five hundred dollars ($500), executed by S. Corning Judd, which bond is now presented and approved by the court.

129 *Certificate of division.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs. } Foreclosure.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL.

In the matter of the intervening petition of E. E. Souther & Bro.

The matter of the intervening petition aforesaid in the above-entitled cause was submitted to the honorable Thomas Drummond, circuit judge, and the honorable Samuel H. Treat, district judge, etc.

On the 6th of December, 1877, the complainant in the above-entitled cause, The Union Trust Company of New York, filed its bill of complaint herein for the foreclosure of the mortgage executed by the defendant in the above-entitled cause, which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the Cairo & St. Louis Railroad Company
130 covered by such mortgage; and thereupon the complainant moved the court for the appointment of a receiver in pursuance of the prayer of said bill. The court allowed the motion and appointed a receiver by decree of that date, in which decree the court, of its own motion, inserted the clause, copied as follows, viz:

"And said receiver, after paying the expenses of operating, maintaining, and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said railroad company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree."

The receiver, thus appointed, qualified and took possession of said railroad, property, and assets on the same day; and afterwards, on the 9th day of March, 1878, the petitioners, E. E. Souther at. [1] Brother, filed in this cause their intervening petition, praying for the allowance of their claim of five hundred and thirty-two dollars and fourteen cents ($532.14), set

forth in said petition, for supplies furnished to said railroad company, within six months prior to the appointment of such receiver, as
131 more particularly set forth in said petition.

An answer was filed to said intervening petition by The Union Trust Company, of New York, aforesaid, and also by the receiver, in each of which answers it was admitted that there was due from the said railroad company to said petitioners, at the time of filing such petition, the sum of five hundred and thirty-two dollars and fourteen cents, for supplies furnished to said railroad company within the six months immediately preceding the appointment of the receiver, as stated.

On the hearing evidence was heard showing that in the year 1876 a payment of three thousand dollars ($3,000.00) was made by the Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, not to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States and in connection with the forbearance which they had given to the said company in respect to over-due interest. This was the only evidence offered or heard tending to show any diversion by the railroad company from the current debt fund or gross income to or for the benefit of the mortgage bondholders.

132 Evidence was also heard (under the objections of the said Union Trust Company for irrelevancy) in respect to the earnings of said railroad while operated by the receiver, and the application of the same, as shown by a stipulation between the parties and filed in this cause, and to which reference is hereby made.

It was also proven on the hearing that the claim of the petitioners is for iron materials, other than rails, that were used by the company in repairing the said railroad, and the rolling-stock, machinery, and buildings thereon, within six months prior to said December 6th, 1877; all of which is more particularly set forth in said stipulation between the parties.

It was also proven upon the hearing that the unpaid claims for labor, materials, and supplies furnished to such railroad company, and used upon said road and appurtenances within the six months next preceding the appointment of said receiver, including the claim of petitioners, amount to the sum of sixty-five thousand dollars and upwards. For the allowance of these unpaid claims intervening petitions were filed in this cause on or before July 1st, 1881, and are still pending in this court.

133 On said hearing of the matter aforesaid upon this state of facts, the opinion of the circuit judge prevailing, a decree was entered in favor of petitioner's claim as paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint, in respect to the granting or rendition of which decree the opinion of the judges were opposed upon the following points, the affirmative of each of which was held by said circuit judge and the negative thereof was claimed by the complainants The Union Trust Company of New York, as one of the respondents in the matter of said intervening petition, viz:

First. Whether the court, in the order of December 6th, 1877, appointing the receiver herein, or subsequently in the progress of the cause, had the power to direct the payments, out of the money in the registry of the court, or that might thereafter be paid into the registry of the court, aris-

ing from the sale of the property covered by the mortgage, of claims for supplies similar to those stated in the petition in this case, in preference to the claim arising upon the mortgage given to the complainant in this cause, there being no evidence showing a previous diversion of money from the current earnings or income of the railroad company
134 prior to the appointment of the receiver herein, except the proof introduced showing such diversion, in the manner stated, to the extent of three thousand dollars ($3,000).

Second. Whether the court had the right to make the order directing the payment of the claim of the petitioners in this case under the circumstances stated and proved.

Consequently the said judges hereby state the said questions and certify the same, and direct that the certificate hereof be entered of record.

THOMAS DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Indorsed:) Filed September 19, 1882. J. A. Jones, clerk.

135 *Certificate of evidence.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD CO. ET AL. } Foreclosure.

In the matter of the intervening petition of E. E. Souther & Bro.

It is hereby certified that on the hearing of the matter of the aforesaid intervening petition of E. E. Souther & Brother, the complainant, The Union Trust Company of New York (being one of the respondents to the intervening petition aforesaid), offered and read in evidence the testimony of Henry W. Smithers, given in his examination-in-chief in said deposition, taken at Chicago, Illinois, on the 13th day of June, A. D. 1881, as follows:

H. W. SMITHERS, being first duly sworn, testified as follows:

Int. What is your name, age, occupation, and place of residence?
136 Ans. My name is Henry W. Smithers; am between 42 and 43 years of age; I am residing at Brooklyn, New York; am receiver of the Cairo and St. Louis Railroad, president of the Paducah and Elizabethtown Railroad, receiver of the Memphis, Paducah and Northern Railroad, and represent also the holders of bonds of other American railroads, such holders residing in Amsterdam, Holland.

Int. Will you please now to state whether you represent the bondholders of the Cairo and St. Louis Railroad Company, such bonds being secured by the mortgage or deed of trust upon such railroad and the property of said company? If yea, state how long you have so represented the same; and state also whether any other person has at any time repre-

sented said bondholders in this country, or been in any way authorized to act for the same; and state also where the major part of said bondholders reside.

Ans. I do represent such bondholders; that is to say, I represent the holders of 2,495 bonds, out of a total number of bonds issued of 2,500. I believe that at least 2,490 of these bonds have been produced to an officer of the court by my principals in proof of their claim there-
137 to. I have represented the bondholders since about March, 1874, when I arrived in this country. There has not been, to my knowledge, any other person, at any other time since March, 1874, authorized to act or speak for the great majority of the bondholders, except myself; and I do not know of any bondholder who has at any time had, since that date, any other representative or agent in the United States. Nearly all the bondholders reside in the kingdom of the Netherlands. I do not know of any bondholders residing elsewhere, except as to about fifteen bonds, about which I have heard that the owners reside in England.

Int. Do you know when the bonds, secured by the mortgage or deed of trust referred to in the bill of complaint in this cause were sold? If so, state about the time or times.

Ans. I do know, as I resided in Amsterdam, Holland, from about May or June, 1871, till at or about the close of the year 1872. The bonds were sold at the end of the year 1871 and the beginning of the year 1872. It is possible that a small portion of the bonds was sold later than this, but they had been in the mean time taken by the bankers and fully paid for, although I think not actually sold out to the public, but
138 by far the larger part were sold before the middle of 1872.

Int. Have you been familiar with or have you had charge of the matter of any or all payments that have been made at any time upon the bonds secured by the mortgage referred to in the bill of complaint? And do you know anything in respect to any payments made by the Cairo and St. Louis Railroad Company for permanent improvements or otherwise which may have resulted for the benefit of the bonded indebtedness? Is there any other person who has had charge of this matter so familiar in respect thereto as yourself? If you have knowledge upon these points please state the same fully, stating particularly whether any payments whatever have been made by the said Cairo and St. Louis Railroad Company to or for the benefit of the bondholders, and whether any permanent improvements have been made by said railroad company upon their railroad or in connection therewith that would enhance or in any way benefit their securities. State particulars in respect to all these matters in your own way.

Ans. As to the time before my appointment as receiver I cannot
139 speak with any such accuracy as to reply properly to the question as to the expenditure for improvements. The company, after May, 1874, went on to complete its line between Murphysboro' and Cairo, and did so complete it, but without analyzing the accounts; I cannot tell out of what funds it completed it, although I know that it received bonds from the city of Cairo and the county of Alexander for a large amount, and that it did not pay the full amount for the rails that it purchased and used in completing the road, and my impression is that the money it got from the county and city bonds, and the debts it concracted and did not pay, more

than supplied it with the amount of the cost for so completing its road; but as regards improvements and additions to the property I have no sufficient knowledge, although from the condition the road was in when I took charge as receiver there cannot have been more expended upon than was necessary to enable it to keep running. There was, I think, some expenditure for a dump and warehouse at Cairo between May, 1874, and December, 1877; but there was money owing upon this when the receiver took possession, it having been borrowed from
140 one of the shippers on the line of the road. As regards any payments to the bondholders I have full knowledge, there having been no one else authorized to represent the bondholders, and no one else, so far as I have ever known, claiming to do so. The company did make between May, 1874, and December, 1877, and I think it was in the year 1876, a payment of $3,000 to the bondholders, which was applied by the bondholders on account of their expenses and disbursements to a very much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the company for interest to the extent of two years upon the coupons of the bonds of the company, for which they consented not to press for immediate payment. The amount so paid was applied in the manner I have stated, with the knowledge of the company, and was remitted to Amsterdam for the purposes stated. This payment has not been applied upon any indebtedness to the company except in the reduction of such claim as the bondholders would naturally have against the company for expenses incurred in connection with the
141 plan under which the interest claims were not immediately pressed. Beyond this payment of $3,000 I do not know of any payments made by the company. Frequent applications were made to the managers of the company for money on account of their indebtedness to the bondholders, but none could ever be obtained, as the then managers professed to be unable to continue running the road and furnish any money to the bondholders. There is no one else so familiar with matters relating to the bondholders as myself, but I cannot speak in the same way as to the affairs of the company before I was appointed receiver, as they were not directly under my charge and I could only know what was told me by the then managers.

Int. State whether the railroad company defaulted in the payment of interest due upon the bonds thus referred, secured by the mortgage or trust deed referred to; and, if so, when and whether the defaults thus referred to have continued from thence hitherto.

Ans. Yes, it did; it defaulted on the first of October, 1873, and has never since to my knowledge paid any money on account of the indebtedness under the mortgage or upon the bonds and coupons to which
142 you refer.

Int. Would you know of any such payment or payments, if any had been made?

Ans. Yes; I think I must have known, for I do not see how they could have paid without my knowing.

Int. State whether any payments have been made on either principal or interest on this bonded indebtedness since your appointment as receiver.

Ans. Not out of any funds or property in my custody as receiver, and not in any manner to my knowledge.

The petitioners thereupon offered and read in evidence the cross-examination of said Smithers, given in said depositions, as aforesaid, as follows:

Cross-examination:

Int. Are you aware whether, before the date of the appointment of the receiver, the earnings of this road exceeded the ordinary operating expenses at any time?

Ans. I cannot say without reference to the accounts.

Int. Can you state if any of the earnings of the road, before the appointment of a receiver, were applied to the construction of the road?

143 Ans. I cannot say without an examination of the accounts, but, as already said, I am under a decided impression that the money used for construction was derived from other sources.

Int. Can you approximately state the amount of the earnings per month of the road since you have taken charge of it as receiver? Please state as nearly as you can what the amount has been.

Ans. Yes; taking the figures up to the 31st day of December last the average gross earnings per month since the date of my appointment will have been about $25,400 per month.

Int. State if this amount was in excess of the ordinary operating expenses of the road; and, if so, how much.

Ans. The revenue accounts from the date of my appointment as receiver up to the 31st of December last show a net revenue of $31,881.30. But this amount will probably have to be very much reduced when the accounts are finally made up, as there are claims against it to a considerable amount. There is one claim against it by the Wiggins Ferry Company for more than $29,000, and while I do not expect this to be paid or allowed there is undoubtedly something due for

144 rentals and other matters which, at any rate, have not yet been charged against revenue account, so that I do not think, when the account is adjusted, there will be more than $15,000 remaining at the credit of revenue account up to the 31st day of December last. I do not regard this as net revenue in the hands of the receiver, as the full amount will be represented by supplies and materials on hand, which I presume will pass with the railroad to any purchaser although included as an asset upon the books of the receiver. In making up this revenue account there have not been charged to the debit of it very large disbursements for the purchase of cars and engines, and for the purchase of land for depot grounds, and for the improvement of the ground, which expenditures were necessary to be made to keep the railroad running. The amount of receiver's certificates outstanding on the 31st day of December last, issued under the order of the United States court, was $303,682.59, and these were issued to acquire depot grounds for the improve-

145 ment of the same and for the purchase of equipment; at least that is the main part of all of them, although there was, I think, a small one of a few hundred dollars issued for a patent right, and some few thousands of dollars issued for supplies under the special order of the court, allowing the receiver to borrow money because he could not, at the time of taking possession, operate the road out of its revenue; but these last certificates have been treated simply as money borrowed under that order. When I took possession of the road, as receiver, I found the

greater part of the rolling stock leased—that is to say, of locomotives; there were six freight engines bought of the Baldwin Works originally, for which the company had not paid and which it was renting, but for which it had not paid rent. These locomotives were afterwards purchased by the receiver and paid for out of the certificates which I have named. There were also a lot of cars leased of Sewall, of Boston, and these were also afterwards acquired by the receiver and paid for with certificates.

146 Int. State if any of these certificates of indebtedness issued by you as receiver have at any time been paid or any part of them by you. If so, how much and to whom and from what source did you derive the money with which you paid them?

Ans. Yes; during the year 1879 I paid off certificates given to M. M. Buck & Co. for supplies, really representing borrowed money to the amount of $4,548.19, and in the year 1880 I paid off certificates issued to the Missouri Car and Furnace Company, and to the Railway Equipment Company to the total extent of $27,389.22. These certificates for the two last named were payable monthly and were given under authority of the court for the purchase of equipment. These amounts have been paid by the receiver out of his current funds, but they have not been charged to the debit of the revenue account. When the equipment was purchased it was charged to the debit of capital account, as can be seen by the

147 last named report, and the certificates were then credited to the certificate account and when paid were deb'ted against the same account, so that they have nothing whatever to do with the net revenue account.

Int. State if there was charged to the revenue fund by you as receiver anything else than the ordinary operating expenses of the road?

Ans. I will give you exact figures for the years 1879 and 1880. In the year 1880 there was charged an amount under the head of extraordinary expenses, as follows:

1. Rental of five (5) miles of railroad between Carondelet and East St. Louis, $4,000. This is, however, although entered as an extraordinary expense, purely a part of operating, as without paying it we could not run the trains into East St. Louis, and could not do the larger part of the business, and it is just as much a part of operating as would be a division of freight with any other railroad company to which we delivered freight to go over their line.

2. An amount for interest on receiver's certificates, $14,186.97.

148 I regard this as strictly an operating expense, as the certificates were issued for equipment and grounds, and had not the receiver purchased these he would have had to pay rental and mileage to a very much larger amount.

3. Legal expenses to the amount of $1,910. These are inevitable, I believe, to operating a railroad.

4. Some additions and improvements to the extent of $11,401.77, the details of which can be seen in the annual report.

5. There was further charged, under the head of extraordinary, an amount of $16,255.35 for payment on account of the railroad company.

For these, as receiver, I do not pretend to be responsible, except as to one or two trifling amounts. I paid the bulk under the order of the court, and in respect of amounts owing by the railroad company, and, of

course, I had nothing out of which to pay them except by charging them to revenue, although I had to borrow money on certificates to make the actual payments, as the earnings of the road have never enabled me,
149 without getting other money, to continue operating it in a proper manner, and to make these payments as ordered by the court.

For the year 1879:

1. There will be found for construction and equipment an expenditure stated in the annual report of $8,430.07.

2. There was an expenditure for rent of locomotives and cars, rent of five (5) miles of railroad, and interest on certificates of $10,001.10.

3. There were payments on account of the Cairo and St. Louis Railroad Company to the extent of $8,013.15.

About these I would state the same as I have stated about the payments for the year 1880. Over and above the foregoing, there were payments in the two years for taxes aggregating rather more than $13,000. As I have previously stated, there will probably be some other charges for rental of depot grounds not yet decided; and the total amount of revenue remaining at the credit of revenue account will, I apprehend, not be actually in my possession, as a certain amount of it will be represented by supplies and materials for which I shall get no money.

150 Int. State what improvements have been made on the Cairo and St. Louis Railroad since you took charge of it; what additions have been made to its rolling-stock; what the comparative condition of its supplies now are with what they were at the time you took charge, and, approximately, the difference in the value of the road on account of these additional improvements and increased supplies.

(Objected to.)

Ans. The additions and improvements made by the receiver and the cost of the same will be found fully stated in account number 4, on the 4th page of the annual report to the 31st of December last. The amount of those additions and improvements will be charged to capital account in the general balances. On the 3rd page of that report all the other expenditures for operating the road will be found in statement number one (1), and the details of such expenditures will be found in a full statement on the 11th page of that report.

151 Int. At the time you took charge of the road as receiver, you found considerable amount of indebtedness to employees and others for labor and supplies due by the railroad co., did you not?

Ans. Yes, I did.

Int. State what you did with reference to that class of claims, as to the adjustment of them, if you did anything.

Ans. Yes, I did. I found so many claims and so much confusion, that I thought it better to help those who had claims for labor so far as I could. The court had by its decree, when it appointed me, directed to pay these claims out of any surplus revenues that might come into my hands; that is to say, all claims which had arisen within a period of six months before my appointment. As it did not look at the time as if I should have any surplus revenue for the purpose, and as it was very difficult to continue running the railroad, and moreover as many of the claims were represented by meal-tickets, I prepared certain forms of certificates, to state that the amount and date of such claims as were clear and beyond dispute

were correct according to the company's books, and on the back of these certificates I had printed an extract from the order of the court.

152 Any claimant about whose claim there was no dispute as to the amount or date could then get one of these memorandum certificates from the auditor. I had these memorandum certificates issued very much because a large number of the laborers came to see me and represented to me that if they had some such kind of certificate, or something to show that they really had a claim upon the company, they could either sell it or borrow money upon it, and in some cases where they wanted to leave and get other work this would enable them to do so.

Cross-examination by C. W. THOMAS, Esq., of counsel for sundry intervening petitioners:

Int. Were you the sole agent in the United States of the bondholders whom you have mentioned?

Ans. Yes; between the dates I have indicated.

Int. Did you as such agent cause the bill in this cause to be filed?

Ans. I did so, under the direction of the bondholders in Amsterdam. Of course I am not the complainant in the bill, which is brought by the Union Trust Co. of New York, but they were instructed thereto

153 by the bondholders, and I believe I was the medium of the instruction.

Int. Is it not true that the bondholders whom you represent placed in your hands discretionary power in and about the collection of any moneys due them from the company, and in and about the foreclosure of the trust deed mentioned in the bill?

Ans. No, sir; I have always reported all that I could learn about these matters, and have taken specific instructions as to each case or matter as it might arise. The committee of the bondholders undoubtedly repose much confidence in me, but have never given me any such discretionary power as your question implies, and have never given me any power, discretionary or otherwise, to collect the moneys due to them. However they have instructed me from time to time to make demand for payment. I do not collect moneys for them except as specially instructed, and I do not act in my discretion except I am specially authorized in special cases so to do.

Int. By what power and authority did you take possession of the property of the Cairo and St. Louis Railroad Company?

154 Ans. Under an order of the United States court entered at Springfield on the 6th day of December, A. D. 1877.

Int. Is that the sole source of the powers you have exercised with relation to the property in question?

Ans. It is. I have whole custody of the property simply as receiver and as officer of the court, and hold it to-day under no other power or authority than that of the court. Since my appointment as receiver I have been particularly careful upon this point.

Int. You said in your examination-in-chief that a sum amounting to about $3,000 was at one time, previous to your appointment, paid by the company to the bondholders to prevent pressure. Will you please state what idea you intended to convey by that expression?

Ans. You have certainly misunderstood what I said, for I never stated that the payment was made to prevent pressure. What I did say was, that it was a payment on account of large expenses incurred by the bond-

holders in connection with their consent to grant a certain forbearance to the company in respect to the payment of coupons.

155 Int. State what particular forbearance you have reference to.

Ans. The matter is seven years old, and consequently the details are not quite fresh in my memory, especially as the entire plan proved abortive; but to the best of my recollection the company asked the bondholders not to press for payment of the coupons due October, '73, and April, '74, and to be content with the payment in cash of one-half only of certain coupons becoming due after those dates. The amounts not paid were, I think, to be funded into ten-year certificates, and the interest on those was to be paid at certain dates. However, the company never paid anything, and nothing was ever consummated about the matter; but the bondholders did not press for the payment of their coupons except in the way of making additional remonstrances to the then manager of the railroad upon the subject of their never getting any money out of the road.

Int. State whether the scheme you have spoken of fell through before or after the payment of the $3,000 you have mentioned.

156 Ans. I do not remember the date of the payment of the $3,000, and I certainly cannot define when the scheme fell through. The bondholders kept on exercising forbearance, and the managers of the company kept on holding the property and the funds.

Int. Do you know how much, or about how much, your principals paid for the bonds they hold?

(Objected to.)

Ans. Yes. I think about eighty cents on the dollar; but I state this without being quite certain, and believing myself to be well within the mark, and, if anything, the cost might average a little more.

Int. State, if you please, in figures, the total amount of revenue derived by you as receiver since you took possession of the property.

Ans. As nearly as I can say, without going into fractions, the amount of gross revenue which has come into my possession as receiver, between the 6th of December, 1877, and the 31st of December, 1880, has been $926,000.

Int. State the total amount of expenditures by you as receiver

157 since you took possession of the property for operating expenses, omitting however, all expenditures which *which* were made for land or any other property which will pass by the sale under the foreclosure decree in this case.

Ans. I make the total amount expended by me up to the 31st of December, 1880, for the purposes indicated, and not including the cost of land or equipment, or cost of supplies which will pass with the property, to be about $895,000. Of course the actual payment will very likely have been larger, but I do not charge the material and supplies except as they remained on hand on the 31st December last.

Int. State whether, at the time you qualified as receiver, you filed an inventory of all the property that came into your charge; and, if yea, whether that inventory is correct.

Ans. I did; it is.

Int. If you are prepared, I wish you would state, from the company's books in your charge, the amount and kind of rolling-stock which the company owned or had in its possession on the 30th day of December,

158 1874, and, if you cannot state the amount on hand at the date given, please state the amount on hand May 4th, 1874, and if you have any written list of such property please attach it to your deposition as an exhibit.

Ans. Yes; I have an exhibit of the rolling-stock on the road of the Cairo and St. Louis Railroad on the 4th of May, 1874, and I now hand it in to be attached to my testimony, and marked Exhibit 1 thereto.

Int. If you are prepared so to do I wish you would state the amount and kind of rolling-stock purchased by the company since the date last named and up to the time when you took possession.

Ans. So far as I know the only rolling-stock acquired by the company between the dates named consisted of the following:

2 passenger coaches.
30 box cars.
8 flat cars.
12 hand cars.
20 push cars.
4 freight locomotives.

The cars were purchased from Mr. Sewall, of Boston, but the company never paid for them, and when the receiver took possession of them he got no title to them, and had to buy them of Mr. Sewall under
159 the authority of the court.

The four locomotives were in like manner bought by the company of Dawson and Bailey, and when the receiver took possession he found that they were not paid for, or that there was a considerable balance due in respect of them.

As receiver I declined to do anything about these locomotives, except to pay rental for them, if I should use them under the authority of the court. These locomotives were removed from the road and were sold by the party who either owned them or had a right to them. At the sale the receiver purchased one of them, and was duly authorized to do so by the court; consequently none of the equipment to which I have referred came to the benefit of the receiver or of the property held by the receiver, except so far as the receiver acquired it at a later day by actual purchase, and the cost of such purchases has been charged to the debit of capital account.

I do not know of any other purchase by the company between the dates named, but I think that the company must have built or bought ten push cars, as I found ten of those cars on my inventory which were not
160 on the previous inventory of May 4th, 1874. I have compared all the other cars, and find that, with the exception of these ten cars, there was less equipment on the road when I took possession than on the 4th of May, 1874, but some of the flat cars had, I think, been turned into coal cars, and I cannot therefore make an exact comparison, but I find that on May 4th, 1874, there were 362 cars on the road under the head of freight, coal, and box cars, while the total of all which I cannot identify as appearing on my inventory when I took possession was 359 cars, which would seem to say that 3 cars have either been wrecked or in some way disappeared.

(Objection to all cross-examination by counsel for compl'ts.)

Thereupon the Union Trust Company aforesaid offered and read in ev-

idence the redirect examination of said Smithers, as given in said deposition, as follows:

Int. Has anybody, other than yourself, been authorized to repre-
161 sent the bondholders in this country?

Ans. Certainly not, so far as concerns a very large majority of the bondholders; but, of course, I cannot say as to any individual independent bondholder may have done. As already stated I represent 2,495 bonds out of 2,500, and speak for them; but I do not pretend to know anything about the others, or to speak for them.

Int. State whether or not the payments made on the receiver's certificates referred to in your cross-examination were so made for any other purpose or purposes than operating or legal expenses, and taxes authorized to be paid by the court, and rolling-stock and other property now held by the receiver.

Ans. There have been no certificates issued except on authority of the court as already stated, either for the purchase or equipment, the purchase of land, the improvement of land, or for money borrowed, to enable the receiver to pay taxes, legal expenses, and other debts ordered to be paid, and for which the receiver had no current funds. There have been no certificates paid off except those previously named in my testimony,
162 consisting of a small amount of short-date certificates for money borrowed, and the certificates maturing at monthly intervals in favor of the Missouri Car and Furnace Co. and the Railway Equipment Co.

Int. In your cross-examination you have mentioned the fact of your having issued certain certificates purporting to show the amount due to certain parties by the railroad co. within six months prior to the appointment of the receiver for labor, materials, supplies; will you please now to state whether or not you have any knowledge whatever of the correctness of those claims and of the amounts thus stated to be due thereon, except as gathered from the books of the company and the pay-rolls thereof; and have you any means of knowledge as to whether or not said books and pay-rolls are correct other than as appears on the face thereof?

Ans. I have no other knowledge except as derived from the books and pay-rolls of the company and the unpaid vouchers which were on file in the company's office when I was appointed receiver. I have no means of testing the accuracy of the books, pay-rolls, and vouchers, ex-
163 cept so far as appears by the books themselves.

It is further certified that thereupon the petitioner offered and read in evidence a stipulation entered into between the parties hereto, and filed on the 19th day of September, A. D. 1882, as follows, viz:

Stipulation.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO AND ST. LOUIS RAILROAD CO. et al.

In the matter of the intervening petition of E. E. Souther & Bro.

It is hereby stipulated by and between the parties in the matter of the intervening petition aforesaid that the deposition of Henry W. Smithers, taken in this cause in Chicago, Illinois, on the 13th day of June, A. D. 1881, either the examination-in-chief or the cross-examination
164 or the re-examination therein may be read in evidence by either of the parties on the hearing of the matter of said intervening petition, subject to objections for incompetency. It is further stipulated and agreed as facts existing in this cause (and this stipulation as to such facts may be read in evidence by the petitioners, E. E. Souther & Brother, on the hearing of this matter, subject to objections for incompetency) viz, that since the Cairo and St. Louis Railroad went into the hands of Henry W. Smithers, as receiver, and in December, A. D. 1877, said road has earned, net, after paying all operating expenses, upwards of two hundred thousand dollars, up to and including December 31st, A. D. 1881. That said receiver, Smithers, has, under the order of this court, from time to time expended all of said net earnings above mentioned in purchasing additional grounds, rolling-stock, etc., and in making permanent repairs and improvements upon said railroad property instead of discharging
165 therewith the claims of said railroad company for labor, materials, and supplies hereinafter referred to; that the claim of E. E. Souther & Brother is for iron materials other than rails that were used by the company in repairing the bed of said railroad and the rolling-stock, machinery, and buildings thereof within six months prior to the appointment of said receiver. That on the 14th day of July, A. D. 1881, said railroad, with the appurtenances, was sold under an order and decree of this court rendered on the 16th day of May, A. D. 1881, and was afterwards conveyed to the purchasers, and that said materials so furnished by the petitioners passed, by such sale and conveyance, to such purchasers as part of such railroad, rolling-stock, machinery, etc., so far as the same had not then been worn out or destroyed by use. That the unpaid claims for labor, materials, and supplies furnished to said Cairo and St. Louis Railroad Company, and used upon said road and appurtenances within the six months next before the appointment of the receiver, included
166 the claim of the petitioners (and for the allowance of which unpaid claims intervening petitions were filed in the above-entitled cause on or before the 1st day of July, A. D. 1881, and are still pending in this court), amount to the sum of sixty-five thousand dollars and upwards. It

is further stipulated by the parties that either party, on the hearing of this matter, may object to any portion of the foregoing testimony or facts for irrelevancy or incompetency.

T. C. MATHER,
Solicitor and of Counsel for Petitioners.
JUDD & WHITEHOUSE,
Solicitors and of Counsel for Union Trust Co. and Receiver.

(Indorsed:) Filed September 19th, 1882. J. A. Jones, clerk.

In witness whereof the undersigned judges of said court have signed this certificate and affixed thereto their seals, and ordered that the same may be made of record.

T. DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Indorsed:) Filed September 19, 1882. J. A. Jones, clerk.

167 *Bond.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States for said district. In equity.

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE CAIRO & ST. LOUIS RAILROAD COMPANY et al. } Foreclosure.

In the matter of the intervening petition of E. E. Souther & Brother.

Know all men by these presents that I, S. Corning Judd, of Chicago, Cook County, Illinois, is held and firmly bound unto the above-named E. E. Souther & Brother in the sum of five hundred dollars ($500), to be paid to the said E. E. Souther & Bro., their executors or administrators; to which payment well and truly to be made he binds himself, his heirs, executors, and administrators firmly by these presents. Sealed with my seal and dated this 19th day of September, A. D. 1882.

168 Whereas the above-named The Union Trust Company of New York has prayed an appeal to the Supreme Court of the United States to reverse the final decree rendered in favor of the said E. E. Souther & Bro. in the above-entitled suit by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named The Union Trust Company of New York shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

S. CORNING JUDD. [SEAL.]

(Indorsed:)
Approved September 19th, 1882.

S. H. TREAT, *District Judge.*

(Also indorsed:) Filed September 19th, 1882. J. A. Jones, clerk.

169 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify the foregoing is a true and complete copy of the bill of complaint, mortgage or deed of trust, copy of bond, copy of coupon, decree appointing receiver, decree of foreclosure and of sale, master's report of sale, intervening petition of E. E. Souther & Bro., answer of receiver to petition of E. E. Souther & Bro., affidavit of E. E. Souther, decree of allowance, May 16, 1878, motion of complainant to set aside decree of allowance of May 16, 1878, motion of receiver to set aside decree of allowance of May 16, 1878, decree of September 8, 1882, vacating decree of allowance May 16, 1878, answer of The Union Trust Company, decree for petitioner September 19, 1882, certificate of division, certificate of evidence, testimony of H. W. Smithers, stipulation of counsel, and appeal bond in a certain cause wherein The
Union Trust Company of New York is complainant and The
170 Cairo and St. Louis Railroad Company, Willis Cauble, and Henry Holbrook, are defendants, as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield, in said district, this first day of November, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 1152. The Union Trust Company of New York, appellant, vs. E. E. Souther & Brother. S. Illinois C. C. U. S. Filed 8th November, 1882.

1 ADDITION TO RECORD.

United States Supreme Court, October term, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, appellant, *vs.* E. E. SOUTHER & BROTHER, APPELLEES. } No. 1152.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is hereby stipulated and agreed by and between the parties that the amount found due to appellant, and ordered to be paid by the decree for payment and sale rendered by the court below on the 16th day of May, A. D. 1881, in the foreclosure case against the Cairo & St. Louis Railroad Company and others, wherein the above-named appellees filed their intervening petition, was the sum of four millions three hundred and one
2 thousand one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53), which, with interest at six per cent. per annum, was ordered by said decree to be paid; and that said sum was not inserted in the decree as certified in this cause, by reason of the mistake of the clerk of the court below in not filling the blanks in a printed copy of the said decree for payment and sale used in making up the transcript for this court.

And it is further agreed that this stipulation may be considered and printed as part of the record in this cause.

Dated December 8, 1882.

S. CORNING JUDD &
WM. F. WHITEHOUSE,
Counsel for Appellant.
T. C. MATHER,
Counsel for Appellee.

(Indorsed:) U. S. Supreme Court. No. 1152. Union Trust Company of New York vs. E. E. Souther & Bro. Stipulation to correct record. Filed 11th Dec., 1882.

(Stamped:) Office Supreme Court U. S. Filed Dec. 11, 1882. James H. McKenney, clerk.

6395——1

OFFICE SUPREME COURT
FILED
JAN 4 1883
JAMES H. McKENNEY, Clerk

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK,
Appellant,
vs.
E. E. SOUTHER & BROTHER,
Appellees.

No. 1152.
Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

S. CORNING JUDD,
W. F. WHITEHOUSE,
ATTORNEYS FOR APPELLANT.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK,
Appellant,
vs.
E. E. SOUTHER & BROTHER,
Appellees.

No. 1152.
Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

I.

STATEMENT.

This case and the two that immediately precede it upon the docket should be considered together. The three cases are representative of a large number of intervening claims pending in the Court below in the forecloseure proceeding hereafter mentioned, (aggregating over $65,000,) all the rest of which intervening claims must abide the the event of these.

The present case presents the same questions as are involved in No. 1150, except the addiditional one arising

in that case whether the lien, if any ever existed in favor of the original holders of the claims, was not lost by assignmen of the claims.

Some of the important facts are stated in the certificate of division signed by the Judges below, which certificate is copied as follows:

1. "On the 6th day of December, 1877, the complainant in the above entitled cause," [the foreclosure case below, being appellant here], "The Union Trust Company, of New York, filed its bill of complaint herein for the foreclosure of a mortgage executed by the defendant in the above entitled cause," (*i. e.*, the Cairo & St. Louis Railroad Company, defendant in the foreclosure case) "which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the Cairo & St. Louis Railroad Company covered by such mortgage; and thereupon the complainant moved the Court for the appointment of a receiver in pursuance of the prayer of said bill. The Court allowed the motion and appointed a receiver by decree of that date, in which decree the Court, *of its own motion*, inserted the clause, copied as follows, viz:

'And said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said Railroad Company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree.'

"The receiver thus appointed qualified and took possession of such railroad property and assets on the same day; and afterwards, on the 9th day of March, 1878, the petitioner, E. E. Souther and Brother filed in this cause their intervening petition, praying for the allowance of their claim of five hundred and thirty-two cents ($532.14) set forth in said petition, for supplies furnished to said Railroad Company within the six months prior to the appointment of such receiver, as more particularly set forth in said petition.

"An answer was filed to said intervening petition by

The Union Trust Company, of New York, aforesaid, and also by the receiver, in each of which answers it was admitted that there was due from the said Railroad Company to said petitioners, at the time of filing such petition, the sum of five hundred and thirty-two dollars and fourteen cents, for supplies furnished to said Railroad Company within the six months immediately preceding the appointment of the receiver, as stated.

"On the hearing, evidence was heard showing that *in the year 1876*, a payment of three thousand dollars ($3,000) was made by the Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they had given to the said Railroad Company, in respect to over-interest. This was the only evidence offered or heard tending to show any diversion by the Railroad Company from the current-debt fund or gross income to or for the benefit of the mortgage bondholders.

"Evidence was also heard (under the objections of said Union Trust Company for irrelevancy), in respect to the earnings of said railroad while operated by the receiver, and the application of the same, as shown by a stipulation between the parties and filed in this cause, and to which reference is hereby made.

"It was also proven on the hearing that the claim of the petitioners is for iron materials, other than rails, that were used by the Company in repairing the said railroad, and the rolling stock, machinery, and buildings thereon, within six months prior to said December 6th, 1877, all of which is more particularly set forth in said stipulation between the parties.

"It was also proven upon the hearing that the unpaid claims for labor, materials and supplies furnished to such Railroad Company, and used upon said road and appurtenances, within the six months next preceding the appointment of the receiver, including the claim of the petitioners, amount to the sum of sixty-five thousand dollars ($65,000), and upwards. For the allowance of these unpaid claims, intervening petitions were filed in this

cause on or before July 1, A. D. 1881, and are still pending in this Court.

"On said hearing of the matter aforesaid upon this state of facts, the opinion of the Circuit Judge prevailing, a decree was entered in favor of petitioner's claim, as paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint; in respect to the granting or rendition of which decree, the opinion of the Judges were opposed upon the following points, the affirmative of each of which was held by said Circuit Judge, and the negative thereof was claimed by the complainant, The Union Trust Company of New York, as one of the respondents in the matter of said intervening petition, viz.:

"*First.* Whether the Court, in the order of December 6, A. D. 1877, appointing the receiver herein, or subsequently in the progress of the cause, had the power to direct the payments out of the money in the registry of the Court, or that might thereafter be paid into the registry of the Court, arising from the sale of the property covered by the mortgage, of claims for supplies, similar to those stated in the petition in this case, in preference to the claim arising upon the mortgage given to the complainant in this cause, there being no evidence showing a previous diversion of money from the current earnings or income of the said Railroad Company prior to the appointment of the receiver herein, except the proof introduced showing such diversion, in the manner stated, to the extent of three thousand dollars, ($3,000).

"*Second.* Whether the Court, had the right to make the order directing the payment of the claim of the petitioners in this case, under the circumstances stated and proved.

"Consequently, the said Judges hereby state the said questions, and certify the same, and direct that this certificate hereof be entered of record."

"THOMAS DRUMMOND. [SEAL.]"
"S. H. TREAT. [SEAL.]"

[See Record, folios 129 to 134.]

2. The stipulation referred to in the foregoing certificate of division contains the following provisions:—

"It is further stipulated and agreed as facts existing in this cause, (and this stipulation as to such facts may be read in evidence by the petitioners, E. E. Souther & Brother, on the hearing of this matter, subject to objections for incompetency,) viz., that since the Cairo & St. Louis railroad went into the hands of Henry W. Smithers, as receiver, in December, A. D. 1877, said road has earned, net, after paying all operating expenses, upwards of two hundred thousand dollars, up to and including December 31, A. D. 1881; that said receiver, Smithers, has, *under the order of this Court*, from time to time expended all of said net earnings above mentioned in purchasing additional grounds, rolling-stock, etc., and in making permanent repairs and improvements upon said railroad property instead of discharging therewith the claims against said Railroad Company for labor, materials, and supplies hereinafter referred to; that the claim of E. E. Souther & Brother is for iron materials other than rails that were used by the Company in repairing the bed of said railroad and the rolling-stock, machinery and buildings thereof, within six months prior to the appointment of said receiver. That on the 14th day of July, A. D. 1881, said railroad, with the appurtenances, was sold under an order and decree of this Court rendered on the 16th day of May, A. D. 1881, and was afterwards conveyed to the purchasers, and that said materials so furnished by the petitioners passed, by such sale and conveyance, to such purchasers as part of such railroad, rolling-stock, machinery, etc., so far as the same had not then been worn out or destroyed by use. That the unpaid claims for labor, materials and supplies furnished to said Cairo and St. Louis Railroad Company, and used upon said road and appurtenances within the six months next before the appointment of the receiver, including the claim of the petitioners (and for the allowance of which unpaid claims intervening petitions were filed in the above-entitled cause on or before the 1st day of July, A. D. 1881, and are still pending in this Court), amount to the sum of sixty-five thousand dollars and upwards." [Rec., folios 164–166.]

3. The morgage or deed of trust referred to in the foregoing certificate of division is set forth in full, beginning at

folio 40 of the transcript of the record. It was executed on the 2nd day of October, A. D. 1881, and covers all the property, real, personal, and mixed, which the said Cairo & St. Louis Railroad Company then owned or thereafter acquired, also the "tolls, income, rents, issues, "and profits thereof," etc. It was given to secure two million five hundred thousand dollars ($2,500,000) principal, and accruing interest thereon at the rate of seven per cent. per annum, payable semi-aunually, which amount was borrowed "to construct and equip" the railroad of that corporation. The mortgage also provides that "until default," etc., the Railroad Company may remain in possession "of the railroad and pemises and 'collect, "receive and use the tolls, income, rents, issues and profits "thereon in any manner which shall not impair the lien "created by" that instrument. [Rec., folios 40, 46, 49.]

4. The mortgage likewise provides that "in case of de- "fault in the payment of any semi-annual installment of "interest," etc., then the trustee may enter into possession of said railroad property, etc., and operate the same "by "such superintendents, managers, *receivers*, assistants, and "servants, or other attorneys or agents, as the said trustee "shall deem proper, making from time to time all such re- "pairs and replacements, and all such useful alterations, "additions, and improvements to the said railroad and "premises as the said trustee may deem expedient and "judicious, and * * * collect and receive all tolls, "fares, freights, revenues, incomes, issues and profits of "the said railroad and premises, and of every part and "parcel thereof," and apply the net proceeds thereof to the payment of overdue and accruing interest, etc. [Rec., folios 50–53.]

The mortgage was duly recorded in the month of Feb-

ruary, 1872, in the recorder's offices of the respective counties, in Illinois, into or through which the line of the railroad was located and afterwards constructed. [Rec., folios, 25, 26, 85.]

5. By the bill of complaint it is averred that the "defendant Railroad Company is insolvent;" "that the "property so mortgaged is insufficient in value to secure "the payment of the bonds" covered by the mortgage; and "that the revenue of the said defendant Railroad Com- "pany is not sufficient to pay the interest on said bonds." [Rec., folio 34.] The decree for payment and sale finds these and all other allegations of the bill to be true. [Rec., folio 88.]

6. By stipulation between the parties, as given in an "Addition to the Record," it will be seen that by the decree for payment and sale, rendered by the Court below on May 16, 1881, the Court found to be due at that date, upon the bonds and coupons secured by the mortgage mentioned in the bill of complaint, the sum of four millions, three hundred and one thousand, one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53). [This stipulation was made because the clerk below in preparing the record in this case, used a printed copy of the decree without filling the blanks therein with the statement of the amount found to be due and ordered to be paid.]

7. The master's report of the sale of the railroad property, etc., under the decree for payment and sale, shows that the sale was made on July 14th, 1881, for the sum of four million dollars, ($4,000,000). [See Record, folios 95, 101.] Hence it will be perceived that the sale was for three hundred and one thousand one hundred and fifty-seven dollars and fifty-three cents, ($301,157.53),

less than was found by the Court to be due on the 16th of May preceding. The accrued interest between the 16th of May and the 14th of July would, of course, make the deficiency nearly $30,000 more, up to the time of the sale.

8. The master's report shows also that the purchasers at the time of the sale paid $100,000 into the registry of the Court on the purchase price. [Record, folio 102.]

9. The decree rendered in favor of the appellees, September 19th, 1882, (the opinion of the Circuit Judge prevailing, as stated in the foregoing certificate of division), provides that "the said petitioners are entitled to "the payment of their claim, to wit, the sum of five hun- "dred and thirty-two dollars and fourteen cents, ($532.14), "as a lien upon the property and assets of the said Cairo "& St. Louis Railroad Company or the proceeds of the "sale thereof, paramount to the indebtedness secured by "the mortgage or deed of trust referred to in the bill of "complaint;" and said decree directs, accordingly, that the said sum of $532.14, with interest from that date, "shall be paid over to the petitioners out of the money "now in the registry of this court, or that may hereafter "be paid into the registry of this court, arising from the "proceeds of the sale of the premises and property re- "ferred to in the bill of complaint herein," and that the complainant pay the costs. To all of which the respondent below (appellant here) objected and excepted at the time of the rendition of such decree. [Record, folios 126–129.]

The respondent below thereupon prayed an appeal to this Court from said decree, which was granted and perfected. [Record, folios 128, 167–8.]

10. The questions involved at bar, under the state of facts thus presented, are, *First*, whether or not claims such as that of the appellees, ought to be allowed at all, to be paid out of any money in the registry of the Court below, arising from the sale of the railroad property and assets covered by the mortgage or trust deed, or out of any money arising from the sale that may hereafter come into such registry, in preference to the lien and equities existing under the mortgage or deed of trust in favor of appellant, there being no "evidence showing a diversion of "the money from the current earnings or income of the "said Railroad Company prior to the appointment of the "receiver," as stated in the certificate of division, "except the proof showing that *in the year 1876* a payment "of three thousand dollars ($3,000) was made by the "said Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the "bonded indebtedness, but which was applied on account "of the expenses of such beneficiaries, to a much larger "amount in keeping an agency in the United States, in "connection with the forbearance which they gave to said "Railroad Company in respect to over due interest," [Rec., folio 131]; *Second*, if appellees are entitled to any allowance whatever, whether or not the same should be granted as against the prior lien of the mortagee for any more than the proportion that appellees' claim ($532.14) bears to the $65,000 and upwards, of unpaid claims for labor, materials, and supplies furnished to the Railroad Company, and used upon its road and appurtenances, within the six months next preceding the appointment of the receiver, [Rec., folios 165–6]; and, *thirdly*, whether the court below had the right to make the order directing the payment of appellees' claim, under the circumstances stated and proved.

II.

Assignment of Errors.

The appellant, The Union Trust Company of New York, trustee in the mortgage or deed of trust, makes the following assignment of errors:

First. The Court below erred in finding that there was any diversion whatever by the Railroad Company in favor of the mortagees, even to the extent of the three thousand dollars ($3,000) mentioned.

Second. The Court below erred in decreeing that the petitioners below were entitled to the payment of their claim, to the amount of $532.14, out of the money in the registry of the Court, or thereafter to come into such registry, *arising from the sale of the railroad property and assets* covered by the mortgage or deed of trust, and that they were so entitled to such payment of their claim, as being paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint.

Third. The Court below erred in entering the decree that the clerk of that Court pay to the petitioner below the said sum of $532.14, out of any money then in the registry of the Court, or thereafter to come into such registry, arising from the sale of *the railroad property and assets* covered by the mortgage or deed of trust aforesaid, and also in decreeing that the respondent below pay the cost of the proceeding below.

Fourth. The Court below erred in allowing and de-

creeing the payment of the claim of the petitioners below to any extent, at the most, beyond the percentage of the three thousand dollars ($3,000) that appellees' claim of $532.14 bears to the total amount of $65,000 and upwards of unpaid claims pending in the Court below for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

Fifth. The Court below erred in rendering the decree in favor of the petitioner below.

Sixth. The Court below erred in not disallowing the claim of the petitioner below and dismissing the petition.

Seventh. The decree of the Court below is otherwise erroneous, informal, insufficient, etc.

III.

Brief of the Argument.

I.

No Diversion Proven.

1. There is no prentense of any diversion by the Railroad Company for the benefit of the mortgage creditors, unless to the extent of three thousand dollars ($3,000) paid by the Railroad Company "in the year 1876" (at least eleven months before the appointment of the receiver), "on account of the expenses of the beneficiaries "to a much larger amount in keeping an agency in the "United States, in connection with the forbearance which "they gave to the said Railroad Company in respect to "overdue interest." [Rec., folios 7, 8.] See also record in No. 1,152, at folio 140, for Mr. Smithers' testimony in reference to this matter. This forbearance was for the benefit of the Railroad Company alone. The mortgage creditors could derive no advantage thereform.

This is not the kind of a diversion from the current debt fund which would warrant the allowance of the intervening claims for labor or supplies, even to the extent of the per centage that $3,000 bears to the total amount of such claims, namely, $65,000 and upwards.

2. Even if this payment of $3,000 can be regarded as a diversion at all, still it was not made "within the six "months immediately preceding the rendition of the de-"cree appointing the receiver," the same having been made "in the year 1876." [Rec., folio 7.]

The bill to foreclose the mortgage was filed, and the receiver appointed December 6th, 1877. [Rec., folios 4, 5.]

II.

THERE HAVING BEEN NO DIVERSION, THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this Court holds, that "in the exercise of a *sound judicial* discretion," the chancellor, when asked to appoint a receiver, may "impose such terms in reference to the payment from the "income during the receivership, of such outstanding "debts, for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under "the circumstances of the particular case, appear to be "reasonable."

This "discretion," however, is not left to the caprice of the chancellor. It is a discretion regulated by law. It must be a "*sound judicial* discretion," and the chancellor must "so mould his order, that, while favoring one, injus-"tice is not done to another." *Idem.*, 253.

This Court has defined the bounds within which this "sound judicial discretion" may be exercised, which are, briefly stated, simply, that when a railroad company takes from the current earnings money that in equity belongs to the operatives and supply-men, and diverts it to or for the benefit of the mortgagees, then the net income of the receivership, which otherwise belongs exclusively to the beneficiaries under the mortgage, may be drawn upon

by the chancellor to *pay back* what has thus wrongfully been diverted from the current debt fund.

In other words, if not only the net but also a part of the gross earnings are applied by the railroad company for the benefit of the mortgaged debt, either by way of payment to the mortgage bondholders, or by way of making permanent improvements upon the property, by means whereof the mortgaged security is enhanced, then, and in that case, so far as such earnings and income are trenched upon, over and beyond the net income, the chancellor may order a *restoration* for the benefit of the operatives and material men who contributed to the gross income within the time indicated by the court. "The income out "of which the mortgagee is to be paid is the net income "obtained by deducting from the gross earnings what is "required for necessary operating and managing expenses, "proper equipment and useful improvements."

Fosdick v. *Schall*, *supra*, 252–4.

The chancellor has no "*power*" to overstep these bonds.

This Court say:

"The POWER *rests upon the fact that, in the administration of the affairs of the company*, THE MORTGAGE CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGS TO THE WHOLE OR PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* RESTORATION *by the mortgage creditors of that which they have inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of the restoration should be made to depend upon the amount of the diversion."** *Ibid.*, *254.*

It is very clear from this, that the chancellor has no authority, in appointing a receiver, or subsequently in the

progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted.

It follows that if, in the merely *interlocutory order* appointing a receiver, the court, *of its own motion*, as in the case at bar, inadvisedly directs such debts to be paid out of the receivership funds, the error will be corrected by subsequent order, or on the final hearing of the intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated; and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred-"itors, and the presumption that thus arises" must be overcome before they can be deprived of it.

Fosdick v. *Schall*, *supra*, 225.

The Court below in the final decree, in our view of the matter, wholly disregarded the spirit and the letter of the rulings referred to in *Fosdick* v. *Schall;* and such decree is therefore erroneous and should be reversed.

2. Special attention is called to the fact that the Court below in the decree appointing the receiver, "*of its own* "*motion*, inserted the clause" providing for the payment of the six months claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.]

There having been no showing, at that time, of any diversion whatever, for the benefit of the mortgage creditors, we insist that it was not "in the exercise of a sound

"judicial discretion" that the order was so modified. And the error should have been corrected on the final hearing, when it appeared *affirmatively* that there had been *no diversion whatever* from the gross income of the Railroad Company to or for the benefit of the mortgagees.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland R'y Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished the railroad company, unless the company, before the receiver took possession, diverted money belonging to the current debt fund for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, is relied upon by opposing counsel; but it does not antagonize *Fosdick* v. *Schall*. On the contrary, it refers to the latter case as furnishing the basis of the decision rendered by this Court. This Court refused to allow a claim for materials furnished "for construction purposes," "but ruled "that payment should be made 'only' for supplies to the "machinery department" furnished within two months prior to the appointment of the receiver, and which supplies "the receiver, after his appointment, continued to "use, and for which nothing had been paid." *Ibid.*, 392.

These supplies "to the machinery department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The great injustice that would be done in ignoring solemn contract obligations, by advancing a single step,

in the interest of unsecured or general creditors, beyond the spirit and philosophy of the ruling in *Fosdick* v. *Schall*, in respect to diversion as the basis of the power of restoration, is forcibly illustrated by Judge COFER, of the Kentucky Court of Appeals, in his able dissenting opinion in *Douglas, etc.*, v. *Cline, etc.*, 12 Bush, at pages 658 and 672; to which opinion we invite the attention of this Tribunal.

6. In *Dennison et al.* v. *C. A. & St. L. R. R. Co.*, 4 Bissell, 414, the same doctrine is held and forcibly illustrated.

7. The decree below, from which this appeal is taken, directs appellee's claim to be paid out of moneys in the registry of the Court, "*arising from the sale of the rail-*"*road property and assets covered by the mortgage or deed* "*of trust.*" (Record, folio 15.)

The first two points stated in the certificate of division, present the question whether the Court below "had the "power to direct the payment out of the money in the "registry of the Court, or that might thereafter be paid "into the registry of the Court, *arising from the sale of* "*the property* covered by the mortgage or deed of trust, "of claims for labor, similar to those stated in the petition "in this case, in preference to the claim arising from the "mortgage or deed of trust to the complainant," etc. (Record, folios 10, 11.)

We submit that there is no such power under the facts proven in the present case.

8. The mortgage in this case was given "for the pur-"pose of procuring the means necessary to construct and "equip" the railroad of the mortgagor. [Rec., No. 1152, folio 40.]

The railroad was built with the money realized from the bonds secured by the mortgage, and the bondholders, therefore, have a higher equity than that of ordinary mortgage creditors.

The decree below cannot be sustained upon any basis other than of pushing aside the mortgage contract, and "giving priority to the last creditor for aiding to conserve "the thing," on the principle favored in maratime law, which this court has determined cannot be done.

Galveston R. R. v. *Cowdrey*, 11 Wall., 482.

In that case Pulsford had a fourth mortgage for money advanced by him, which, with the iron laid on the road, (upon which iron he had a specific lien before it was laid,) completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien, because his means "applied to the road, saved "it, and rendered it capable of being used, which it would "not have been otherwise;" [*Ibid.*, 464, 465]; and because when the first three mortgages were executed that portion of the road "was not in existence, and could not have "been conveyed thereby, and can only be embraced "therein on a principle of equitable estoppel, which is re-"butted when it comes in conflict with a superior equity." *Ibid.*, 480.

Notwithstanding these facts, this Court repudiated the claim, Mr. Justice BRADLEY delivering a very lucid and forcible opinion, which emphatically enunciates and vindicates the superior equities of prior contract obligations, for which we now contend.—*Ibid.*, 481–2.

In our view, the equities of Pulsford were far superior to those of appellee in the case at bar. All there was of the five miles of railroad, upon which he sought a lien,

was created by means of his money, and yet the prior mortgages took it all. Appellee's claim at bar receives its only vitality, in the present controversy, because of its relation to what was done in the way of "aiding to con-"serve" the mortgaged property.

9. No Statutory Lien. There was no statute of Illinois in force at the time the mortgage in question was given and recorded, nor until some months thereafter, giving any lien upon a railroad for materials or supplies furnished. The mortgage was "recorded before the 1st day of February, A. D. 1872." [Record, folio 4.]

On July 1st, 1872, an act of the legislature of Illinois, passed April 3d of that year, went into effect, by which a lien was given on certain conditions, and under certain limitations, to contractors, laborers, etc., for their claims against railroad companies for labor and materials furnished. R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.

There is no pretence, nor can there be, of any claim, in the case at bar, arising under the statute.

III.

Net Earnings during the Receivership.

The net earnings of the road during the receivership "were applied from time to time, *by order of the Court*, "for the preservation of the property, and, with the con-"sent of the complainant" below, "in purchasing addi-"tional grounds and rolling stock, etc., and in making "permanent repairs or improvements upon said railroad "property, instead of discharging therewith the claims

"against said Railroad Company for labor, materials and "supplies." [Rec., folio 8.]

Opposing counsel contended below, and will doubtless do so here, that this was a diversion of the funds which ought to have been applied for the payment of the claims for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

This claim is based upon the idea that the income of the receivership was a fund in the control of the Court, to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of that officer, of amounts due from the Railroad Company for labor and supplies within the preceding six months, which direction was not followed, therefore there was such a diversion of that income as requires restoration to be made out of the proeeeds of the sale of the mortgaged property.

1. This does not follow. Even if the provision in the decree appointing the receiver, requiring the six months' claims to be paid, was within the range of a "*sound* "*judicial* discretion," (which we insist it was not), still, that order was only an *interlocutory* one, and was subject to modification by the Court below, which was done by subsequent "orders of the Court for the preservation of the "property," etc., as stated. [Rec., folio 8.]

All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under "the control of the court."

Fourniquet et al. v. *Perkins*, 16 How., 82, 86.

Therefore, the provision for the payment of the six months' claims inserted by the Court below, "of its own "motion," in the decree appointing the receiver, having been afterwards, in the progress of the cause, *modified* by that Court, the case, as it now stands, must be treated the same as if no such provision had been inserted in that decree.

2. Secondly; the net income of the road earned during the receivership belonged to the beneficiaries under the mortgage, and could not lawfully be diverted therefrom for the payment of any general or unsecured claims of the Railroad Company, unless there had been a previous diversion from the gross income of the Company in favor of the mortgaged creditors, as held in *Fosdick* v. *Schall*.

"The income out of which the mortgage is to be paid "is the net income obtained by deducting from the gross "earnings what is required for necessary operating and "managing expenses, proper equipment and useful im-"provements."

Fosdick v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, "*prima facie belongs to the mortgage credit-*"*ors*, and the presumption which thus arises" must be overcome before they can be deprived of it. *Ibid.*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion say, say that:

"In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver

appointed, and deliver possession to him. *In either case the income would thereafter be theirs.*"

Ibid., 800.

See also, to the same effect,

Gillman et al. v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

See also,

S. E. A. Ins. Co. v. *Stebbins*, 8th Paige's Ch., 565.

Jones on R. R. Securities, § 114.

High on Receivers, § 643.

Jones on Mortgages, § 1536.

Ellis v. *B. H. & E. R. R. Co.*, 107 Mass., 1.

Hayes v. *Dickenson*, 9 Hun. (N. Y.), 277.

Post v. *Dorr*, 4 Edw. (N. Y.), Ch., 412.

Warner v. *Gouverneur's Ex'rs*, 1 Barb., 36.

Beverly v. *Scott et al.*, 4 Gratton, 208.

G. & C. U. R. R. Co. v. *Menzies*, 26 Ill., 121, 148.

M. V. & W. R'y Co. v. *U. S. Ex. Co.*, 81 Ill., 534–536.

IV.

ARGUMENT.

I.

NO DIVERSION PROVEN.

1. In the certificate of division it is stated that "the "only evidence offered or heard tending to show any di- "version by the Railroad Company from the current debt "fund or gross income of said Company to or for the "benefit of the mortgage bondholders" is "that *in the* "*year 1876* a payment of three thousand dollars ($3,000) "was made by the said Cairo and St. Louis Railroad "Company to the beneficiaries under the mortgage, *not* "to be applied on the bonded indebtedness, but which "was applied on account of the expenses of the bene- "ficiaries to a much larger amount in keeping an agency "in the United States, and in connection with the for- "bearance which they gave to the said Railroad Company "in respect to overdue interest." [Rec., folios 7, 8.] This statement is clearly sustained by the testimony of Mr. Smithers, which is given in full in the Souther & Bro. case; for which testimony see the Record in No. 1,152 of the present docket, at folio 140.

We submit that this does not establish that kind of a diversion from the current debt fund which will warrant any allowance of intervening claims for labor or supplies furnished the Railroad Company, even to the extent of three thousand dollars, ($3,000.) The money was not applied nor "to be applied on the bonded indebtedness." It was paid and applied toward the expense of "keeping

"an agency in the United States" in connection with the forbearance which the mortgage bondholders gave to the Railroad Company. The mortgage creditors got no benefit from the forbearance. This could have resulted only to the Railroad Company.

In the first and second points of division, stated by the Judges below, it will be observed that the Judges seem to hold that that there was a diversion to the extent of this three thousand dollars, ($3,000); but they expressly declare that there is *no evidence* in the record *showing any other diversion* "from the current earnings or income of the Rail-"road Company prior to the appointment of the receiver."

It follows, therefore, in our view of the law, that if any allowance whatever was authorized in the case below, it was only to the extent of the *pro rata* share which appellee's claim bears to the total amount of the claims pending in the Court below for labor and supplies furnished to the Railroad Company within the six months prior to the appointment of the receiver.

2. Secondly, it will be observed, that even if this payment can be regarded as a diversion at all, still it was not made "within the six months immediately preceding "the rendition of the decree appointing the receiver." The evidence and the statement in the certificate of division show that the three thousand dollar ($3,000) payment was made "*in the year 1876.*" [Rec., folio 7.] The bill to forclose the mortgage was filed and the receiver appointed on the *6th day of December, 1877.* [Rec., folios 4, 5.]

Thus it is rendered clear, beyond all dispute, that there was no diversion whatever by the Railroad Company for the benefit of the mortgage creditors within the time indicated by the decree appointing the receiver, inasmuch

as even the three thousand dollar ($3,000) payment is shown to have been made at least *eleven months* before such appointment, having been made sometime "in the "year 1876."

II.

THERE HAVING BEEN NO DIVERSION, THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this court has determined that "when a court of chancery is "asked by "railroad mortgagees to appoint a receiver of railroad "property, pending proceedings for foreclosure, the court, "in the exercise of a sound judicial discretion, may, as a "condition of issuing the necessary order, impose such "terms in reference to the payment, from the income dur- "ing the receivership, of such outstanding debts for labor, "supplies, equipment or permanent improvement of the "mortgaged property as may, under the circumstances of "the particular case, appear to be reasonable,"

But this "discretion" is not left to the mere whim or caprice of the chancellor. It is a discretion regulated by law. The chancellor must exercise "a *sound judicial* dis- "cretion," and must "so mould his order, that, while "favoring one, injustice is not done to another." [*Idem*, 253.]

Now let us see upon what basis the chancellor may "impose such terms" as are thus indicated, and what is to be the test of "the exercise of a *sound judicial* discre- "tion" in the premises.

We are not left to the domain of speculative reasoning in this regard; for, in the case referred to, this Court has drawn a clear and distinct dividing line beyond which the chancellor's "discretion" may not rightfully pass. The Court say that:

"When the companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, *in order that bonded interest may be paid*, and a disastrous foreclosure postponed, if not altogether avoided. In this way *the daily and monthly earnings*, which ordinarily should go to pay the daily and monthly expenses, *are kept from those to whom they in equity belong and* USED TO PAY THE MORTGAGED DEBT. *The income out of which the mortgagee is to be paid is the net income*, obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly *agrees that the current debts*, made in the ordinary course of business, *shall be paid from the current receipts*, before he has any claim upon the income. IF, for convenience of the moment, SOMETHING IS TAKEN FROM WHAT MAY NOT IMPROPERLY BE CALLED THE CURRENT DEBT FUND, AND PUT INTO THAT WHICH BELONGS TO THE MORTGAGE CREDITORS, it is certainly not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order *that what is due from the earnings to the current debt* shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, *until possession of the mortgaged premises is actually taken*, or something equivalent done, the whole earnings belong to the company, and are subject to its control." [*Ibid.*, 252-3.]

"We think, also, that *if* no such order is made when the receiver is appointed, and *it appears in the progress of the cause* THAT THE BONDED INTEREST HAS BEEN PAID, *additional equipment provided, or lasting improvements made* OUT OF EARNINGS WHICH OUGHT IN EQUITY TO HAVE BEEN EMPLOYED TO KEEP DOWN DEBTS FOR LABOR, SUPPLIES AND THE LIKE, it is within the power of the courts to use the *income of the receivership* to discharge the obligations which, BUT FOR THE DIVERSION OF FUNDS, *would have been paid in the ordinary course of business.* This, *not* because the creditors to whom such debts are due, have in law a lien upon the mortgaged property or the income, but, because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; *and* IF THEY GIVE TO ONE CLASS OF CREDITORS THAT WHICH BELONGS TO ANOTHER, *the court may, upon an adjustment of accounts, so use the income which comes into its own hands, as if practicable to restore the parties to their original equitable rights.* While, ordinarily, this power is confined to the appropriation of the income of the receivership, and the proceeds of the monied assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the *court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments.* In this way the value of the mortgaged property is not unfrequently materially increased.

"*Under such circumstances, it is easy to see that there may sometimes be a propriety in* PAYING BACK TO THE INCOME FROM THE PROCEEDS OF THE SALE WHAT IS THUS AGAIN DIVERTED FROM THE CURRENT DEBT FUND, IN ORDER TO INCREASE THE VALUE OF THE PROPERTY SOLD." [*Ibid.*, 253, 254.]

And again the Court say:

"The POWER *rests upon the fact that in the administration of the affairs of the company,* THE MORTGAGED

CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGED TO THE WHOLE OR A PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* **restoration** *by the mortgage creditors of that which they have thus inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of diversion."** [*Ibid.*, 254.]

There is no mistaking what is meant by this opinion. Human language is incapable of expressing in clearer phrase the holding of this Court, that the chancellor has *no authority*, in appointing a receiver, or subsequently in the progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted by the company from the payment of such debts, and *paid to the mortgage creditors, or for equipment or permanent improvements that enhance their security.* It follows that if, in the merely interlocutory order appointing a receiver, the court, as in the case at bar, of its own motion, inadvisedly or erroneously directs that such debts shall be paid out of the receivership funds, the error will be corrected, by subsequent order, or on the final hearing of intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated, and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred-"itors, and the presumption that thus arises" must be overcome before they can be deprived of it. [*Fosdick* v. *Schall*,

supra, 255.] "The income out of which the mortgagee "is to be paid is the *net income* obtained by deducting from "the gross earnings what is required for necessary "operating and managing expenses, proper equipment, "and useful improvements." (*Ibid.*, 252.)

2. In this connection, we recall attention to the important fact that the Court below, in rendering the decree by which the receiver was appointed, "OF ITS OWN MO-"TION, inserted the clause" providing for the payment of claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.] There having been nothing before the Court when that decree was rendered showing any diversion whatever, we submit that, under the ruling in *Fosdick* v. *Schall*, the Court had no *power*, nor was it "the exercise of a *sound judicial* discre-"tion," to thus order payment of such six months' claims, as a condition of the appointment of the receiver. And especially was it beyond the legitimate power of the Court below, on the final hearing of the intervening claim now at bar, to direct the payment of the same, when it appeared *affirmatively* that there had been *no diversion* from the current debt fund or gross income of the Railroad Company to or for the benefit of the mortgage bondholders, within the six months fixed by the decree appointing the receiver, nor at any other time, unless to the extent of the $3,000 paid in 1876, as stated, over eleven months before the receiver was appointed.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland Railway Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished a railroad company, unless the company, before the

receiver took possession, diverted money belonging to the current debt fund, for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, does not antagonize *Fosdick* v. *Schall*, but, on the contrary, refers to that case as furnishing the basis of the decision rendered by this Court. The Union Car Spring Manufacturing Company, within two months prior to the appointment of the receiver, sold and delivered to the railway company certain car springs and spirals, "*which the re-*" *ceiver, after his appointment, continued to use*, and for "which nothing had been paid." Hale, Ayer & Co. also furnished certain supplies to the machinery department. Other materials were furnished "for construction pur-" poses." This Court refused to allow these latter, but ruled that payment should be made for the supplies "to " the machinery department," and for such supplies "only." [*Ibid.*, 392.]

These supplies "to the machine department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The philosophy of the ruling in *Fosdick* v. *Schall*, is conclusive. The net income only being pledged by the mortgage, if the bondholders have been paid or have received the benefit of that part of the gross income accrued within a reasonable and limited time before the receivership, which ought to have been applied to necessary repairs and operating expenses, it is but simple justice that what has been thus wrongfully diverted should be

restored; but beyond this line no court can pass without trampling upon solemn contract obligations, held sacred through the ages, and subordinating secured indebtedness to that which is general and unsecured.

In commenting upon such injustice, Judge COFER, of the Kentucky Court of Appeals, in his dissenting opinion in *Douglas, etc.*, v. *Cline, etc.*, 12 Bush, 658, says:

"A decision producing, or that may produce, such a result seems to me to overturn the very foundation of contract rights, and virtually to destroy all securities in the form of liens upon property, and to convert an intended benefit attempted to be secured by solemn contract, of which the world had notice, into a positive disadvantage, and to make the lack of all attempt to provide a security by contract the very best possible security, through a supposed discretion of the chancellor.

"Such a conclusion is not the offspring of any recognized or even of an asserted principle of equity. No rules or principles are laid down as conducting to a result so anomalous. It is simply said that the chancellor has a discretion to appoint a receiver or not, when applied to for that purpose, and that in this instance there was no abuse of discretion in so modifying the order of appointment as to require him to pay out of the earnings of the mortgaged property debts due to persons having no contract, or legal or equitable lien on the fund, to the exclusion of those having a lien on the property producing it, and who, it is decided by the majority of the court, have *prima facie*, an equitable claim to the whole fund, and at whose instance the receiver was appointed to rescue it from an insolvent and unfaithful corporation.

"Rights depending upon the discretion of courts are not the most valuable. They can never be measured; their extent and value are unknown, and are incapable of being ascertained."

The same learned Judge, later in the opinion, adds:

"If these appellees have an equity to be paid out of the earnings in the receiver's hands for labour done

before his appointment, because they bestowed their labor on the road and thereby kept it up, why shall not the material men who furnished articles indispensable to the operating of the road be paid also? If the men who furnished necessary material are entitled to be paid, upon what principle of laws or morals shall the men who furnished money to make cash purchases be refused? And if all these are to be paid out of the earnings to the exclusion of the mortgagees, there will remain no debts to be paid but the mortgage debts, and these being postponed to all others it will result that the only persons not secured are those who alone had taken security for their debts." *Ibid.*, (12 Bush), 672.

6. In the foreclosure case of *Dennison et al.* v. *C., A. & St. L. R. R. Co.*, 4 Bissell, 414, intervening petitioners, who had furnished supplies to the railroad company before the receiver was appointed, claimed that they had an equitable lien upon the moneys under control of the court, arising from the sale of the property, and received from the earnings of the road. The distinguished Judge of the seventh circuit, in delivering the opinion of the court dismissing the petitions, remarks:

"Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them because those with whom they have dealt cannot do so.

"Upon general principles I hold, what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all, except specific liens, and those, of course, have to be paid in their order."

7. It should be specially noted that the decree from which this appeal is taken directs that the clerk pay the petitioners (appellees) the amount of his intervening claim "out of any money now in the registry of this Court, in "this cause, arising from the sale of the railroad property "and assets covered by the mortgage or deed of trust "aforesaid, or if sufficient money is not now in such reg-"istry, then that he pay the aforesaid amount of said "claim to the petitioner out of any money arising from "such sale that may hereafter come into the registry of "the Court." [Rec., folio 15.]

It should likewise be noted that in the first two points stated in the certificate of division, the question is submitted whether the Court "had the power to direct the "payment out of the money in the registry of the Court, "or that might thereafter be paid into the registry of the "Court, arising from the sale of the property covered by "the mortgage or deed of trust, of claims for labor, sim-"ilar to those stated in the petition in this case, in prefer-"ence to the claim arising upon the mortgage or deed of "trust to the complainant in this case," etc. [Rec., folios 10, 11.]

The Court below, therefore, ordered appellees' claim to be paid not from earnings of the road during the receivership, but *from proceeds of the sale of the property and assets* embraced in the mortgage. This, we submit, was clearly erroneous.

8. As has been seen, the mortgage or deed of trust

in the case at bar was given "for the purpose of procur- "curing the means necessary to construct and equip" the railroad of the mortgagor. [Rec., No. 1,152, folio 40.]

The railroad was built with the money realized upon the bonds secured by the mortgage, and the bondholders, therefore, have a higher equity than that of ordinary mortgage creditors. In the face of these facts, the Court below (the opinion of the Circuit Judge prevailing) decreed that the proceeds of the sale of the mortgaged property, so far as necessary, be paid out of the registry for labor and supplies furnished the mortgagor within six months before the receiver was appointed, nothwithstanding there is no pretence of any diversion from the current debt fund to or for the benefit of the beneficiaries under the mortgage within that time, or at any other time, unless possibly to the extent of $3,000, in 1876, as heretofore explained.

We respectfully submit that this decree cannot be sustained upon any other basis than that of pushing aside the mortgage contract, and "giving priority to the last "creditor for aiding to conserve the thing," on the principle favored in maritime law, which this Court has expressly determined cannot be done.

Galveston Railroad v. *Cowdrey*, 11 Wallace, 482.

In that case Pulsford's money, secured by the fourth mortgage, completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien (and the iron laid thereon, before it was laid, having been, in a separate article, specially pledged as security to him), because his means "applied "to the road, saved it, and rendered it capable of being

"used, which it would not have been otherwise," [*Ibid.*, 464 and 465], and because when the first three mortgages were executed that portion of the road "was not in "existence, and could not have been conveyed thereby, "and can only be embraced therein on a principle of "equitable estoppel, which is rebutted when it comes in "conflict with a superior equity." [*Ibid.*, 480.]

This Court emphatically repudiated the claim thus asserted. Mr. Justice BRADLEY, in delivering the opinion, said:

"Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. * * * By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, *by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them.*" [*Ibid.*, 481 and 482.]

We make these citations not because they contain any new theories, but because they very forcibly enunciate propositions of law so old that "the memory of man "runneth not to the contrary," and because the philosophy of the opinion and decision is fatal to the theory which underlies the decree in the case at bar; by which decree

proceeds of the sale of the mortgaged property are directed to be paid to the full amount of an unsecured claim, some six years the junior of the indebtedness secured by the deed of trust, thereby "giving priority to the last "creditor for aiding to conserve the thing," contrary to the established rules of equity.

In our view, the equities of Pulsford in the *Cowdrey* case were far superior to those of appellees in the case at bar. All there was of the five miles of railroad, upon which he sought a lien, was created by means of his money, and yet the prior mortgages took it all. Appellees' claim at bar receives its only vitality in the present controversy, because of its relation to what was done in the way of "aiding to conserve" the mortgaged property.

Those who furnished labor or materials, in thus "aiding "to conserve" the property, did so with full knowledge of the mortgage recorded years before, and "consented to" the benefits resulting to the road from such labor and materials "being covered by the mortgage in question. "They acquired no lien which can displace" it. Their only reliance for compensation was upon the gross earnings of the road. They took their chances as to the sufficiency of such earnings. If these were diverted to the benefit of the mortgage creditors, then, and not otherwise, can restitution be enforced, as clearly demonstrated in *Fosdick* v. *Schall*.

9. No Statutory Lien.—Attention is called to the fact that the mortgage under consideration in this cause, executed October 2, 1871, was "recorded before the first "day of February, A. D., 1872, in the offices of the "recorders of the various counties in the State of Illinois,

"into or through which the line of the railroad was located "and afterwards constructed." [Rec., folio 4.]

On July 1st following, an act of the legislature of that state went into effect, which had been passed April 3rd, 1882, by which act a lien was given to "contractors, sub-"contractors and laborers" for "their claims against "railroad companies," under certain limitations and conditions. [R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.]

It will be observed, therefore, that the mortgage had been both executed and recorded before the act was passed, and at least five months before it went into effect; so that the statute can have no possible bearing in the present controversy. Nor is there any pretense that any steps whatever were taken under the statute in order to acquire a lien thereunder. These were essential in case the statutory provisions could be invoked at all.

III.

Net Earnings during the Receivership.

Opposing counsel contended below that because the net earnings of the road during the receivership "were ap-"plied from time to time, *by order of the Court*, for the pre-"servation of the property, and, with the consent of the "complainant" below, "in purchasing additional grounds "and rolling stock, etc., and in making permanent repairs "or improvements upon said railroad property, instead of "discharging therewith the claims against said Railroad "Company for labor, materials, and supplies," [Record, folio 8]; because this was done, opposing counsel contended below, and will doubtless urge here, that the bond-

holders got the benefit of earnings which should have been applied to discharge indebtedness incurred by the Railroad Company for labor and supplies, and hence that restoration should be made out of the proceeds of the sale. The position urged was, and doubtless will be here, that the net income of the road during the receivership was a fund in the control of the Court to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of the receivership, of amounts due by the Railroad Company for labor and supplies furnished to the Company within the preceding six months, which direction was not followed, but such income was used otherwise as stated, therefore there was such a diversion of that income as requires restoration to be made out of the proceeds derived from the sale of the *corpus*.

1. This position is a *non sequitur*. Even if it be urged that the direction for the payment of the Railroad Company's indebtedness for labor and supplies, as contained in the order appointing the receiver, was the exercise of a "*sound judicial* discretion," (which we insist it was not, without proof of diversion of the gross income by the Railroad Company to or for the benefit of the mortgage creditors), still, that order was merely an *interlocutory* one, and was subject to modification by the Court below, in the exercise of a like "sound judicial discretion"; and this Court will notice that the disposition that was made of the net income of the receivership, was so made "*by order*" *of the Court below*, expressly given for that purpose. [Rec., folio 8.]

The Court below, having discovered that its order for payment of claims against the Railroad Company for labor and supplies, as contained in the decree appointing the

receiver, was unjust, *rightfully modified* the same by subsequent orders directing the application of the net income earned during the receivership "for the preservation of "the property," "and in making permanent repairs or "improvements," etc. That the Court had authority thus to modify the interlocutory decree, by which the receiver was appointed, there can be no manner of question. All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under control of "the court."

Fourniquet et al. v. *Perkins*, 16 Howard, 82, 86.

The claim of appellees therefore, gains no support whatever from the provision referred to in the order appointing the receiver, in any view that can be taken of the same; for that provision was not permitted to stand, and under the circumstances, must be treated as though no such provision had been incorporated into the decree.

2. We answer, secondly, that the net income of the road, earned during the receivership, belongs to the beneficiaries under the mortgage; and it was not in the power of the Court below to divert the same, or any part thereof, to the payment of any of the general or unsecured indebtedness of the Railroad Company, unless there had been a previous diversion from the gross income of the Railroad Company, within a reasonable or limited time, in favor of the beneficiaries under the mortgage; in which case restoration could be made from the net income of the receivership, as held in *Fosdick* v. *Schall*.

A railroad company, so long as suffered to remain in possession of its property, is generally entitled to the income, rents and profits, of the road, and may contract for

labor and supplies needed in operating and maintaining the property, and creditors furnishing such labor and supplies may attach the tolls due from other corporations; but whenever possession is taken by the mortgagee, through a receiver or otherwise, from that time the beneficiaries under the mortgage are entitled to the earnings of the property. Even before such possession is taken, the mortgagee, when the income is covered by the deed of trust, as in the case at bar, is entitled to the net income of the property. "The income out of which the mort-" gage is to be paid is the net income obtained by deduct-" ing from the gross earnings what is required for neces-" sary operating and managing expenses, proper equip-" ment and useful improvements." *Fosdick* v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, "*prima facie belongs to the mortgage* "*creditors*, and the presumption which thus arises" must be overcome before they can be deprived of it. *Fosdick* v. *Schall*, *supra*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion, say that: "In this case, upon the default " which occurred, the mortgagees had the option to take "personal possession of the mortgaged premises, or to " file a bill, have a receiver appointed, and possession de-" livered to him. In either case *the income would there-*" *after have been theirs.*" *Ibid.*, 800.

See also, to the same effect, *Gillman et al.* v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

And see also *S. E. A. Ins. Co.* v. *Stebbins*, 8th Paige's Ch., 565; Jones on R. R. Securities, § 114; High on Re-

ceivers, § 643; Jones on Mortgages, § 1536; *Ellis* v. *B. H. & E. R. R. Co.*, 107 Mass., 1; *Hayes* v. *Dickenson*, 9 Hun, (N. Y.), 277; *Post* v. *Dorr*, 4 Edw., (N. Y.), Ch., 412; *Warner* v. *Gouverneur's Ex'rs*, 1 Barb., 36; *Beverly* v. *Scott et al.*, 4 Grattan, 208; *G. & C. U. R. R. Co.* v. *Menzies*, 26 Ill., 121, 148; *M. V. & W. R'y Co.* v. *U. S. Ex. Co.*, 81 Ill., 534, 536.

Respectfully submitted.

S. CORNING JUDD,
W. F. WHITEHOUSE,
Attorneys for Appellant.

17-591

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1882.

No. 1152

THE UNION TRUST COMPANY OF NEW YORK,
APPELLANT,

VS.

E. E. SOUTHER & BROTHER,
APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES,

BY T. C. MATHER,

SOLICITOR FOR E. E. SOUTHER & BRO.

SPRINGFIELD:
H. W. ROKKER, PRINTER AND BINDER.
1882.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1882.
No. 1152.

THE UNION TRUST COMPANY OF NEW YORK,
APPELLANT,

VS.

E. E. SOUTHER & BROTHER,
APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES.

The material facts of this case are these:

On the 6th day of December, 1877, appellant, by its solicitors, filed in the Court below, its bill for foreclosure, alleging, amongst other things, that the Railroad Company was insolvent, that the property mortgaged was insufficient to secure the payment of said bonds, and that the revenue of the Railroad was not sufficient to

pay the interest on the bonds, and that many and large claims, of the character known as floating debt, existed against the Company, and that unless a Receiver is appointed by the Court, great, irreparable damage to said bondholders will ensue, and the property will be liable to be greatly depreciated, and to be involved in useless litigation.

The bill then prayed, in order that all the property, rights, immunities, and franchises of the Company might be subjected to the control of the Court, that the Court would appoint a Receiver *according to the course and practice of the Court, with the usual powers of Receivers in like cases.*

Record, pp. 1, 12, 13.

Thereupon the Court, with appellant present in Court, by its solicitors, and making no objection to any provision thereof, as appears by the record, approved the decree of December 6, 1877, appointing a Receiver, and providing, amongst other things, that said Receiver, after paying the expenses of operating, maintaining and repairing said Railroad and property, and after making such other payments as are, or may be, necessary for the conduct of such receivership, *should pay and discharge all* amounts due and owing by said Railroad Company for labor *or supplies*, that may have accrued *in the operation, or maintenance*, of said Railroad property within six months immediately preceding the rendition of the decree.

Record, pp. 26, 29.

At the January term, 1878, of said Court, the intervenors filed their petition, and asked to be allowed to intervene in the foreclosure suit of appellant, and asked to make the Railroad Company, Appellant and the Receiver, defendants, and prayed for a

lien to the extent of their claim, and that the defendants, or some of them, might be ordered and compelled to pay them the sum found due.

The petition was accompanied by a copy of the account, showing the character of iron furnished the Railroad Company, and the dates when furnished.

Record, pp. 43–46.

Thereupon followed the answer of Receiver, filed by counsel for appellant, admitting the supplies within the six months, *and admitting that the claim should be paid in accordance with the terms of the decree, December* 6, 1877.

Record, pp. 46, 47.

On May 16th, 1878, the Court rendered a decree ordering payment by the Receiver of said claim, out of the first money coming to his hands above the running expenses of the railroad, and before any improvements or ameliorations are made upon the property in his hands as Receiver.

Record, pp. 48–49.

On June 5th, 1878, the appellant, by its attorneys, entered a motion to *modify* the foregoing order, *that the same may accord with the decree of December* 6, 1877.

Record, pp. 49–50.

This motion was not disposed of until September 8th, 1882, when the Court set aside the order of May 16th, 1878, ordering payment *as therein specifically provided,* and allowed counsel for the appellant to file an answer to the petition, they filing *no further* answer *for the Receiver.*

Record, pp. 51–2.

Thereupon, on September 19th, 1882, upon a further hearing of the matter, the Court again ordered payment of this claim out of money *now in the registry of the Court*, or that may thereafter be paid thereinto, arising from the proceeds of the sale of the premises and property referred to in the bill of complaint.

Record, p. 52.

The Court will observe that counsel representing both the Receiver and appellant first answered, admitting that this claim ought to be paid pursuant to the provision of the decree of Deeember 6th, 1877, afterwards, and before the Receiver could pay it out of the earnings, and under that provision, as consented to by their answer of May 13th, 1878, they interposed a motion, June 5th, 1878, not excepting to this provision of the decree, but simply asking that the order allowing the claim be modified *so as to conform to it.* This motion, until it was disposed of, September 8th, 1882, prevented the Receiver paying it out of the current earnings.

At this latter date, *for the first time,* counsel for appellant raise the objection that the Court has no power to order payment of such claims, without there had been a diversion of earnings by the company.

They make the further point, in their brief now filed, that even if the Receiver had the right and power, under the provision of the decree of December 6th, 1877, to have paid this claim out of net earnings of the receivership, still, he having *neglected* to do so, and applied those net earnings, under orders of the Court, elsewhere, there is no power now to pay this claim out of the proceeds of the sale.

If any weight was given to this point, it would be allowing them to take advantage of their own delays, for, had they not interposed this motion to modify, and kept it pending five or six years so that the Receiver could not act in reference to paying this claim, it might have been paid before the net earnings were absorbed by improvements, purchases, repairs, ~~and~~ in behalf of the road.

Counsel *now* complain at length, in their brief, that the Court inserted, of its own motion, the provision in the decree of December 6th, 1877, under which these six months' claims for supplies are ordered paid, and also insist that even if there was power to order them paid out of the net earnings, now, that those net earnings are absorbed, it is not equity to order them paid out of the proceeds of the sale.

It ought to be enough reply to this first complaint to say that the Record shows that both the Receiver and Trust Company, by their attorneys, in the incipiency of this claim, and for some years after, during the progress of its litigation *consented to and recognized* this very provision in the decree of December 6th, 1877, which they *now* complain was inserted by the Court on its own motion.

It ought, also, to be answer enough to the other complaint, that if the Receiver and the Court disposed of the net earnings in the management of the trust property without this claim being paid thereout, that it was because appellant had interposed, and kept in the way, a motion which prevented such payment.

But we will pass over, with these remarks, the question, whether a party litigant may be allowed, first, to consent to a certain provision of a decree, and the allowance of a claim thereunder, by

order of Court, and obstruct the payment of that allowance by a motion kept pending for years, and then change his mind, and insist the Court had no power to so order.

The bill of items accompanying intervenors' petition, as well as the stipulation referred to in the certificate of division, show the claim to have been for iron supplies furnished within six months of the appointment of the Receiver, and that the same was used in repairing the road bed, rolling stock, machinery, and buildings.

Record, pp. 45 and 65.

The road, whilst in the hands of the Receiver, earned, net, after paying all operating expenses, upward of $200,000, which the Receiver, under order of the Court, from time to time, expended *in purchasing additional grounds, rolling stock,* and in making *permanent repairs and improvements* upon said railroad property.

Record, p. 65.

That property has since been, by decree in favor of appellees, sold and transferred, and appellees insists that the Court had no power to provide, in its decree of December, 1877, for the payment of such claims as intervenors', out of the earnings of the road, nor any power since to order their payment out of any money in the registry of the Court, arising from proceeds of the sale or otherwise.

Counsel argue that this question of power in the Court to make such orders, turns entirely upon the law governing statutory and mortgage liens, and that as their bondholders had a recorded mortgage upon and along the line of this road covering the road-bed, appurtenances, future acquired property, earnings, etc., be-

fore intervenors' claim existed, that therefore the Court had no right nor power to insert a clause in the decree appointing a Receiver requiring, or allowing, payment of such claims as against their lien.

Their brief is mainly devoted to arguing, and citing authority, to the effect that no equity can prevail against this mortgage lien; and is secondarily occupied with an attempt to show that the doctrine of *Fosdick* v. *Schall*, 99 U. S. 235, is inapplicable to this character of claim.

In the first place, we do not understand that the law governing ordinary questions of mortgage liens has any bearing upon this controversy; and we think, consequently, much of the argument and authority relied upon by counsel for appellant have no relevancy to the case at bar.

The administration of these railroad interests by the courts through receivers, appointed upon application of the mortgage bondholders, has given rise to a *peculiar equitable doctrine* well defined by this Court, and which alone applies to, and determines, the rights of intervenors in the case at bar.

This doctrine, as distinctly deducible from the opinion of this Court, in *Fosdick* vs. *Schall*, and applicable to this precise character of claim, may be summarized as follows:

That every railroad mortgagee, in accepting his security, *impliedly agrees* that the debts made in the ordinary course of business shall be paid from the receipts before he receives any of the income, and if he applies to a court of equity to appoint a receiver, pending foreclosure, the court can impose equitable conditions before it will undertake to administer the trust, amongst which may be the exercise of the right to pay

from the income of the receivership *outstanding debts* for *supplies*, equipment, or improvement of the mortgaged property. Cases may also arise where equity will require it to use the proceeds of the sale for the same purpose. And if the Court is called upon, in administering the trust, to take income, which would otherwise be applied to the payment *of old debts*, to use for current expenses and to make permanent improvements on the fixed property, or to buy additional equipment, it may pay back to the income what is thus diverted to increase the value of the property sold.

"The same may sometimes be true *in respect to expenditures before the appointment of a receiver*. No fixed and inflexible rule can be laid down for the government of the courts in all cases."

The character of the terms which a court of equity may in such cases impose, are only limited to such as may appear to it, under the circumstances of the particular case, *to be reasonable*.

99 U. S., pp. 251, 252 and 254.

The above summary, sets forth the equitable doctrine of this Court, about in its own language, as applicable to cases like the present.

The reasons for ignoring, to a certain extent, the priority of the mortgagee's lien to everything, according to the strict letter of their legal rights, and requiring them, in cases like these, to concede somewhat to the enforcement of this equitable doctrine, is admirably stated by this Court in its opinion on page 252.

As to the existence of this equitable doctrine, as a rule of this Court, and that it ignores and displaces, to a certain extent, strict legal rights, and liens, there can be no longer any controversy.

Every argument that counsel for appellant in this case have advanced, or can advance, together with a multitude of authorities, were advanced, and cited, in combatting this doctrine, by counsel opposed to it, in the hearing of the *Fosdick* v. *Schall case* in this Court, as will be seen by turning to pages 241 to 247 of 99 U. S.

The only possible room for controversy, then, between the learned counsel for appellant and ourselves is, whether the claim of the intervenors, under the circumstances of this case, calls for an application of this doctrine.

They insist it does not, mainly because the record shows but a slight diversion of earnings *by the Company before the appointment of the Receiver.* We do not understand the opinion as limiting the doctrine to so narrow a compass. The Court say no fixed rule can be laid down governing all cases.

That the Court may take from the sale money, and refund to the income or earnings what it has been called upon during the progress of administering the trust, to divert from the payment of old debts, in order to make permanent improvements and keep up repairs.

In the case at bar, $200,000 of net earnings, which ought to have liquidated, under the terms and conditions imposed by the Court in its decree of December 6th, 1877, under which it consented to assume the trust, the supply-claim of intervenors, and perhaps others, of the $65,000 worth, were temporarily diverted by the

Receiver by order of Court, to purchasing additional grounds, rolling-stock, etc., and thus adding to the value of the property to be sold.

The very language of this Court, in defining the outlines of this equitable doctrine which the Courts may apply, says that in such cases the Courts may repay from the proceeds of the sale back to the earnings what has been thus diverted. And that it may do it to pay *old debts, those contracted before the appointment of the Receiver.* The rule applied in the particular case must be what seems to the Court *reasonable* under the circumstances; that is all. The diversion does not have to be one made by the *Company before a Receiver is appointed,* in order to pay a debt contracted for supplies *before the appointment,* hence the point made by counsel has no force in it, because it is not in the line of this decision, but much narrower. Why is it not reasonable and equitable that this claim should be paid out of funds now in the registry of the Court, or the proceeds of the sale? It has certainly contributed its fair part to these net earnings that were diverted from it and other claims, to improving the value of the property sold.

If there is anything about a railroad lasting and permanent, only less so than the soil composing the road-bed itself, it may be said to be iron supplies which repair and improve the track, machinery and buildings, and which may well be supposed to last so long as the appurtenances themselves to which they are attached. When the supplies specified in intervenors' bill of items, attached to their petition, is inspected, it may fairly be assumed that they aided in accumulating the net earnings, and went, in part at least, with the sale, and contributed to

the purchase money. Why, then, in reason and equity, ought not the sale-money to refund to the current debt fund, what would pay for these supplies?

This seems to us to be the whole inquiry in this case; and that their claim for these supplies should be paid as provided in the order of the Circuit Court, would seem to be clearly within the spirit and letter of this decision.

There are other decisions of this Court, besides this one of *Fosdick* vs. *Schall*, which distinctly recognize the power of Courts of Equity to keep a road in repair, and manage and use it in the ordinary way, when it consents to administer its affairs by a Receiver pending foreclose.

Barton vs. *Barbour*, 104 U. S. 135-36.

Wallace vs. *Loomis*, 97 U. S. 162.

Cowdrey vs. *Galveston, R. R. Co.* 93 U. S. 354.

Appellant in its bill filed, asking for a Receiver and foreclosure, as we have already shown from the Record, prayed the Court to appoint a Receiver, *according to the course and practice of the Court with the usual powers of receivers in like cases.* What is the practice of the Federal Courts in Equity, in such cases, and what powers do they in such cases clothe the receivers with?

It may be said the practice is to insert a clause in their decrees appointing receivers, requiring them to pay out of earnings, after paying operating expenses, claims for labor and supplies *furnished within six months prior to the appointment.* The decree then in this case was not unusual, but was according to the practice of the Court appealed to, and the powers therein conferred upon the Receiver was the usual power conferred in like cases.

What consistency, then, is there in appellant now complaining that the Circuit Court inserted, of its own motion, this six months clause in its decree appointing a Receiver? The Court did just what appellant asked it in its bill to do, and what it was the practice of the Court to do.

And as we have also already shown from the record, appellant did not at the time object to the Court inserting this provision in the decree, but afterwards, by its attorneys, in the answer they filed for the Trust Company's Receiver, and in the motion they filed to modify the order in favor of petitioners' claim, *so as to accord with said decree*, it expressly consented to, and recognized, the equity of said provision.

The Court in this case was called upon during its administration of the trust to expend $200,000 of net earnings for the enlargement, improvement, and permanent repair of the property sold, instead of paying therewith, in the ordinary course, the $65,000 of six months' claims for labor and supplies.

If it was equitable and reasonable in the decree appointing a Receiver, and competent for the Court to provide for the payment of these claims out of earnings of the road, over operating expenses, what is there inequitable, unreasonable, or incompetent in the Courts restoring enough of those earnings from the sale-proceeds to cancel those claims now, before it lets go the trust?

The Circuit Court may be said to have incurred, because it by its decree appointing a Receiver, *assumed to pay*, these six months' claims for supplies, and this Court has said there can be no doubt that it is the duty of a court to pay from the

trust fund it has in possession all the debts it incurred in its judicial capacity while administering the trust assumed.

Myer vs. *Car Co.*, 102 U. S. 13.

Without going outside of the decisions of this Court, above referred to, we then respectfully submit, if their spirit and fair purport does not fully sustain the equity and justice of the decree in behalf of appellees, entered by the Circuit Court in this cause.

Respectfully submitted, by

T. C. MATHER, *Solicitor for*

E. E. SOUTHER & BRO.

17-595

OFFICE SUPREME COURT U. S.
FILED
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IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK, *Appellant*,

vs.

EDWARD FITZGERALD, *Appellee.*

No. 1151.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

S. CORNING JUDD,
W. F. WHITEHOUSE,
ATTORNEYS FOR APPELLANT.

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET, CHICAGO.

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IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1882.

THE UNION TRUST COMPANY OF NEW YORK,
Appellant,
vs.
EDWARD FITZGERALD,
Appellee.

No. 1151.
Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

I.

STATEMENT.

This case and Nos. 1150 and 1152 are test cases, involving intervening claims filed in a proceeding in the Court below to foreclose a mortgage given to appellant by The Cairo & St. Louis Railroad Company, which claims amount in all to the sum of $65,000 and upwards. This and the Walker case (No. 1150) involve precisely the same points, except that the latter presents the additional question as to whether the equitable lien, if any ever existed, in favor of the original holders of the claims, was not lost by assignment of the claims to Walker.

Most of the more prominent facts are briefly stated in the certificate of division signed by judges below, which is copied as follows:

1. "On the 6th day of December, A. D. 1877, the complainant (in the foreclosure case below, being appellant in this court), The Union Trust Company, of New York, trustee, etc., filed its bill of complaint herein for the foreclosure of a mortgage or deed of trust executed by the defendant in the above entitled cause," (*i. e.*, the Cairo & St. Louis Railroad Company, defendant in the foreclosure case) "on the 2nd day of October, A. D. 1871, and recorded before the first day of February, A. D. 1872, in the offices of the recorders of the various counties in the State of Illinois, into or through which the line of the railroad of said defendant was located and afterwards constructed, which mortgage or deed of trust covered all the property, real personal and mixed, which the said railroad company then owned or should thereafter acquire," [also the tolls, income, rents, issues and profits, etc., as see *post*], "and which bill of complaint prayed, among other things, for the appointment of a receiver of the railroad and of all the other property and assets of the said Cairo & St. Louis Railroad Company covered by said mortgage or deed of trust; and thereupon the complainant in said bill of complaint moved the Court for the appointment of a receiver in pursuance of the prayer of said bill. The Court allowed the motion and appointed a receiver by order or decree of that date, in which order or decree the Court, *of its own motion*, inserted the clause, copied as follows, viz:

'The said receiver, after paying the expenses of operating, maintaining and repairing said railroad and property, and after making such other payments herein authorized as are or may be necessary for the conduct of such receivership, shall pay and discharge all amounts due and owing by said Railroad Company for labor or supplies that may have accrued in the operation and maintenance of said railroad property within six months immediately preceding the rendition of this decree.'

"The receiver thus appointed qualified and took possession of such railroad property and assets on the same day; and afterwards, on the 4th day of June, 1881, the petitioner, Edward Fitzgerald, filed in this cause his intervening petition, praying for the allowance of his claim of

three hundred and thirty-two dollars and twenty-eight cents ($332.28) set forth in said petition, for labor by him performed for said Railroad Company within the six months prior to the appointment of the receiver aforesaid. An answer was filed by the respondent, The Union Trust Company, of New York, aforesaid, neither admitting nor denying the allegations of the petition so far as the same referred to the claim aforesaid, and denying any diversion by the railroad company from the current debt fund or gross earnings of the company to or for the benefit of the mortgage bondholders within four years prior to the appointment of a receiver.

"On the hearing before the special master, and afterwards before the court, it was proven, by evidence heard in the matter of said intervening petition that the petitioner performed labor for the said Cairo & St. Railroad Company, in the operation of the railroad, to the amount of three hundred and thirty-two dollars and twenty-eight cents ($332.28), within the six months next preceding the appointment of said receiver, which amount remained wholly unpaid.

"On said hearing, evidence was also heard showing that *in the year 1876*, a payment of three thousand dollars ($3,000) was made by the Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the bonded indebtedness, but which was applied on account of the expenses of such beneficiaries, to a much larger amount, in keeping an agency in the United States, and in connection with the forbearance which they gave to the said Railroad Company, in respect to over-due interest. This was the only evidence offered or heard tending to show any diversion by the Railroad Company from the current-debt fund or gross income of the said company to or for the benefit of the mortgage bondholders. A decree for payment and sale was rendered in the above entitled cause May 16, 1881, and a sale was had thereunder July 14, 1881, the mortgage property selling for over three hundred thousand dollars, ($300,000) less than was then due upon the mortgage indebtedness.

"Evidence was also heard (under the objections of said Union Trust Company), showing that while said railroad

was in the control of the receiver, under the appointment aforesaid, the net earnings thereof were more than sufficient to pay all the indebtedness of the said railroad company for labor and supplies furnished to said company within said six months next preceding the appointment of said receiver; and also that said net earnings during the time of such receivership ware applied from time to time, *by order of this Court*, for the preservation of the property, and, with the consent of the complainant, in purchasing additional grounds and rolling stock, etc., and in making permanent repairs or improvements upon said railroad property, instead of discharging therewith the claims against said railroad company for labor, materials, and supplies.

"It was also proven upon the hearing that the unpaid claims for labor, materials and supplies furnished to such Railroad Company, and used upon said road and appurtenances, within the six months next preceding the appointment of a receiver, including the claim of the petitioner, amount to the sum of sixty-five thousand dollars ($65,000), and upwards. For the allowance of these unpaid claims, intervening petitions were filed in this cause on or before July 1, A. D. 1881, and are still pending in this court.

"On the hearing of the matter of said intervening petition upon this state of facts, the opinion of the Circuit Judge prevailing, a decree was entered in favor of the petitioner's claim, as paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint, in respect to granting or rendition of which decree, the opinions of the Judges were opposed upon the following points, the affirmative of each of which was held by said Circuit Judge, and the negative thereof was claimed by the complainant, The Union Trust Company of New York, as one of the respondents in the matter of said intervening petition, viz:

"*First.* Whether the Court, in the order of December 6, A. D. 1877, appointing the receiver herein, or subsequently in the progress of the cause, had the power to direct the payment out of the money in the registry of the Court, or that might thereafter be paid into the registry of the Court, arising from the sale of the prop-

erty covered by the mortgage or deed of trust, of claims for labor, similar to those stated in the petition in this cause, in preference to the claim arising upon the mortgage or deed of trust to the complainant in this cause, there being no evidence showing a previous diversion of money from the current earnings or income of the said Railroad Company prior to the appointment of the receiver herein, except the proof introduced showing such diversion, in the manner stated, to the extent of three thousand dollars ($3,000.)

"*Second.* Whether the Court, had the right to make the order directing the payment of the claim of the petitioner in this cause, under the circumstances stated and proved.

"Consequently, the said Judges hereby state the said questions, and certify the same, and direct that this certificate hereof be entered of record."

"THOMAS DRUMMOND. [SEAL.]"
"S. H. TREAT. [SEAL.]"

[See Record, folios 3 to 11.]

2. It was stipulated between the parties in the Court below, "that the bill of complaint, orders, decrees, testi-"mony and other matters stated and set forth in the rec-"ord or transcript prepared for the Supreme Court of the "United States in the matter of the intervening petition of "E. E. Souther and Brother, and certified by the clerk on "the first day of November, A. D. 1882," might apply to this case—that is, to the matter of the intervening petition of Edward Fitzgerald in the Court below—so far as applicable, and that the same might "be referred to and "used by either of the parties in the matter of this inter-"vening petition on the appeal herein to said Supreme "Court." [Rec., folios 18, 19.]

The bill of complaint in the foreclosure case, the mortgage or deed of trust, the decree appointing the receiver, the decree for payment and sale, the master's report of the sale, and the testimony of Henry W. Smithers, etc.,

are fully given in the record of the case referred to in said stipulation, being that of *The Union Trust Company of New York, appellant*, v. *E. E. Souther & Bro.*, No. 1152, on the docket of the present term of this Court.

3. By reference to the mortgage, as printed in that record, the fact appears that the same was given by the Cairo & St. Louis Railroad Company to secure $2,500,000 principal, and accruing interest thereon at the rate of seven per cent. per annum, payable semi-annually, which amount was borrowed "to construct and equip" the railroad of the corporation, (Rec., in No. 1152, folios 40, 41 *et seq.*,) which mortgage covers not only the property and franchises then owned and afterwards to be acquired by the Railroad Company, as stated in the foregoing certificate of division, but also the "tolls, income, rents, issues and profits thereof," etc. The mortgage also provides that "until default," etc., the Railroad Company may remain in possession "of the railroad and premises and "collect, receive and use "the tolls, income, rents, issues and profits thereon in any "manner which shall not impair the lien created" by that instrument. [Rec., in No. 1152, folios 47–49.]

4. The mortgage likewise provides that "in case de- "fault in the payment of any semi-annual installment of "interest," etc., then the trustee may enter into possession of said railroad property, etc., and operate the same "by "such superintendents, managers, *receivers*, assistants, and "servants, or other attorneys or agents, as the said trustee "shall deem proper, making from time to time all such re- "pairs and replacements, and all such useful alterations, "additions, and improvements to the said railroad and "premises as the said trustee may deem expedient and "judicious, and * * * collect and receive all tolls, "fares, freights, revenues, incomes, issues and profits of

"the said railroad and premises, and of every part and "parcel thereof," and apply the net proceeds thereof to the payment of overdue and accruing interest, etc. [Rec., in No. 1152, folios 50–53.]

5. By the sworn bill of complaint it is averred that the "defendant Railroad Company is insolvent;" "that the "property so mortgaged is insufficient in value to secure "the payment of the bonds" covered by the mortgage; and "that the revenue of the said defendant Railroad Com- "pany is not sufficient to pay the interest on said bonds." [Rec., No. 1152, folio 34.] The decree for payment and sale finds these and all other allegations of the bill to be true. [Rec., No. 1152, folio 88.]

6. By stipulation between the parties, as given in an "appendix to the record, it will be seen that by the decree for payment and sale, rendered by the Court below on May 16, 1881, the Court found to be due at that date, upon the bonds and coupons secured by the mortgage mentioned in the bill of complaint, the sum of four millions, three hundred and one thousand, one hundred and fifty-seven dollars and fifty-three cents ($4,301,157.53). [This stipulation was made because the clerk below in preparing the record in the Souther case,—No. 1152—used a printed copy of the decree without filling the blanks therein with the statement of the amount found to be due and ordered to be paid.]

7. The master's report of the sale of the railroad property, etc., under the decree for payment and sale, shows that the sale was made on July 14th, 1881, for the sum of four million dollars, ($4,000,000). [See Record, in No. 1152, folios 95, 101.] Hence it will be perceived that the sale was for three hundred and one thousand one hundred

and fifty-seven dollars and fifty-three cents, ($301,157.53), less than was found by the Court to be due on the 16th of May preceding. The accrued interest between the 16th of May and the 14th of July would, of course, make the deficiency nearly $30,000 more, up to the time of the sale.

8. The master's report shows also that the purchasers at the time of the sale paid $100,000 into the registry of the Court on the purchase price. [Record, No. 1152, folio 102.]

9. The decree rendered (the opinion of the Circuit Judge prevailing, as stated in the foregoing certificate of division), provides that "the said petitioner is entitled to "the payment of his claim of three hundred and thirty-"two dollars and twenty-eight cents, ($332.28), out of the "money now in the registry of this court, or hereafter to "come into such registry, arising from the sale of the "railroad property and assets covered by the mortgage "or deed of trust mentioned and referred to in the bill of "complaint in this cause, and that he is so entitled to such "payment of his claim as being aramount to the indebted-"ness secured by the mortgage or deed of trust referred "to in said bill of complaint;" and said decree directs, accordingly, "that the clerk of this court pay to said pe-"titioner the sum aforesaid out of the money now in the "registry of this court, in this cause, arising from the "sale of the railroad property and assets covered by the "mortgage oe deed of trust aforesaid, or, if sufficient "money is not now in such registry, then, that he pay the "aforesaid amount of said claim to the petitioner out of "the monsy arising from such sale that may hereafter "come into the registry of the court, and that the re-"spondent pay the costs herein expended." To all of

which the respondent, the Union Trust Company of New York, objected and excepted at the time of the rendition of such decree. [Record, folios 11–15.]

The respondent below thereupon prayed an appeal to this Court from said decree, which was granted and perfected. [Record, folios 15–18.]

10. The questions involved at bar, under the state of facts thus presented, are, *First*, whether or not claims such as that of the appellees, ought to be allowed at all, to be paid out of any money in the registry of the Court below, arising from the sale of the railroad property and assets covered by the mortgage or trust deed, or out of any money arising from the sale that may hereafter come into such registry, in preference to the lien and equities existing under the mortgage or deed of trust in favor of appellant, there being no "evidence showing a diversion of "the money from the current earnings or income of the "said Railroad Company prior to the appointment of the "receiver," as stated in the certificate of division, "except the proof showing that *in the year 1876* a payment "of three thousand dollars ($3,000) was made by the "said Cairo & St. Louis Railroad Company to the beneficiaries under the mortgage, *not* to be applied on the "bonded indebtedness, but which was applied on account "of the expenses of such beneficiaries, to a much larger "amount in keeping an agency in the United States, in "connection with the forbearance which they gave to said "Railroad Company in respect to over due interest," [Rec., folios 6, 7, 10]; *Second*, if appellees are entitled to any allowance whatever, whether or not the same should be granted as against the prior lien of the mortgagee for any more than the proportion that appellees' claim ($332.28) bears to the $65,000 and upwards, of unpaid claims for

labor, materials, and supplies furnished to the Railroad Company, and used upon its road and appurtenances, within the six months next preceding the appointment of the Receiver, [Rec., folio 8]; and, Thirdly, whether the Court below had the right to make the order directing the payment of appellees' claim, under the circumstances stated and proved.

II.

Assignment of Errors.

The appellant, The Union Trust Company of New York, trustee in the mortgage or deed of trust, makes the following assignment of errors:

First. The Court below erred in finding that there was any diversion whatever by the Railroad Company in favor of the mortagees, even to the extent of the three thousand dollars ($3,000) mentioned.

Second. The Court below erred in decreeing that the petitioners below were entitled to the payment of their claim, to the amount of $332.28, out of the money in the registry of the Court, or thereafter to come into such registry, *arising from the sale of the railroad property and assets* covered by the mortgage or deed of trust, and that they were so entitled to such payment of their claim, as being paramount to the indebtedness secured by the mortgage or deed of trust referred to in the bill of complaint.

Third. The Court below erred in entering the decree that the clerk of that Court pay to the petitioner below the said sum of $332.28, out of any money then in the registry of the Court, or thereafter to come into such registry, arising from the sale of *the railroad property and assets* covered by the mortgage or deed of trust aforesaid, and also in decreeing that the respondent below pay the cost of the proceeding below.

Fourth. The Court below erred in allowing and de-

creeing the payment of the claim of the petitioners below to any extent, at the most, beyond the percentage of the three thousand dollars ($3,000) that appellees' claim of $332.28 bears to the total amount of $65,000 and upwards of unpaid claims pending in the Court below for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

Fifth. The Court below erred in rendering the decree in favor of the petitioner below.

Sixth. The Court below erred in not disallowing the claim of the petitioner below and dismissing the petition.

Seventh. The decree of the Court below is otherwise erroneous, informal, insufficient, etc.

III.

Brief of the Argument.

I.

No Diversion Proven.

1. There is no prentense of any diversion by the Railroad Company for the benefit of the mortgage creditors, unless to the extent of three thousand dollars ($3,000) paid by the Railroad Company "in the year 1876" (at least eleven months before the appointment of the receiver), "on account of the expenses of the beneficiaries "to a much larger amount in keeping an agency in the "United States, in connection with the forbearance which "they gave to the said Railroad Company in respect to "overdue interest." [Rec., folios 7, 8.] See also record in No. 1,152, at folio 140, for Mr. Smithers' testimony in reference to this matter. This forbearance was for the benefit of the Railroad Company alone. The mortgage creditors could derive no advantage thereform.

This is not the kind of a diversion from the current debt fund which would warrant the allowance of the intervening claims for labor or supplies, even to the extent of the per centage that $3,000 bears to the total amount of such claims, namely, $65,000 and upwards.

2. Even if this payment of $3,000 can be regarded as a diversion at all, still it was not made "within the six "months immediately preceding the rendition of the de-"cree appointing the receiver," the same having been made "in the year 1876." [Rec., folio 7.]

The bill to foreclose the mortgage was filed, and the receiver appointed December 6th, 1877. [Rec., folios 4, 5.]

II.

THERE HAVING BEEN NO DIVERSION, THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this Court holds, that "in the exercise of a *sound judicial* discretion," the chancellor, when asked to appoint a receiver, may "impose such terms in reference to the payment from the "income during the receivership, of such outstanding "debts, for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under "the circumstances of the particular case, appear to be "reasonable."

This "discretion," however, is not left to the caprice of the chancellor. It is a discretion regulated by law. It must be a "*sound judicial* discretion," and the chancellor must "so mould his order, that, while favoring one, injus-"tice is not done to another." *Idem.*, 253.

This Court has defined the bounds within which this "sound judicial discretion" may be exercised, which are, briefly stated, simply, that when a railroad company takes from the current earnings money that in equity belongs to the operatives and supply-men, and diverts it to or for the benefit of the mortgagees, then the net income of the receivership, which otherwise belongs exclusively to the beneficiaries under the mortgage, may be drawn upon

by the chancellor to *pay back* what has thus wrongfully been diverted from the current debt fund.

In other words, if not only the net but also a part of the gross earnings are applied by the railroad company for the benefit of the mortgaged debt, either by way of payment to the mortgage bondholders, or by way of making permanent improvements upon the property, by means whereof the mortgaged security is enhanced, then, and in that case, so far as such earnings and income are trenched upon, over and beyond the net income, the chancellor may order a *restoration* for the benefit of the operatives and material men who contributed to the gross income within the time indicated by the court. "The income out "of which the mortgagee is to be paid is the net income "obtained by deducting from the gross earnings what is "required for necessary operating and managing expenses, "proper equipment and useful improvements."

Fosdick v. *Schall*, *supra*, 252–4.

The chancellor has no "*power*" to overstep these bonds.

This Court say:

"The POWER *rests upon the fact that, in the administration of the affairs of the company*, THE MORTGAGE CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGS TO THE WHOLE OR PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* RESTORATION *by the mortgage creditors of that which they have inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of the restoration should be made to depend upon the amount of the diversion."** *Ibid.*, *254*.

It is very clear from this, that the chancellor has no authority, in appointing a receiver, or subsequently, in the

progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted.

It follows that if, in the merely *interlocutory order* appointing a receiver, the court, *of its own motion*, as in the case at bar, inadvisedly directs such debts to be paid out of the receivership funds, the error will be corrected by subsequent order, or on the final hearing of the intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated; and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred-"itors, and the presumption that thus arises" must be overcome before they can be deprived of it.

Fosdick v. *Schall*, *supra*, 225.

The Court below in the final decree, in our view of the matter, wholly disregarded the spirit and the letter of the rulings referred to in *Fosdick* v. *Schall;* and such decree is therefore erroneous and should be reversed.

2. Special attention is called to the fact that the Court below in the decree appointing the receiver, "*of its own* "*motion*, inserted the clause" providing for the payment of the six months claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.]

There having been no showing, at that time, of any diversion whatever, for the benefit of the mortgage creditors, we insist that it was not "in the exercise of a sound

"judicial discretion" that the order was so modified. And the error should have been corrected on the final hearing, when it appeared *affirmatively* that there had been *no diversion whatever* from the gross income of the Railroad Company to or for the benefit of the mortgagees.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland R'y Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished the railroad company, unless the company, before the receiver took possession, diverted money belonging to the current debt fund for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, is relied upon by opposing counsel; but it does not antagonize *Fosdick* v. *Schall*. On the contrary, it refers to the latter case as furnishing the basis of the decision rendered by this Court. This Court refused to allow a claim for materials furnished "for construction purposes," "but ruled "that payment should be made 'only' for supplies to the "machinery department" furnished within two months prior to the appointment of the receiver, and which supplies "the receiver, after his appointment, continued to "use, and for which nothing had been paid." *Ibid.*, 392.

These supplies "to the machinery department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The great injustice that would be done in ignoring solemn contract obligations, by advancing a single step,

in the interest of unsecured or general creditors, beyond the spirit and philosophy of the ruling in *Fosdick* v. *Schall*, in respect to diversion as the basis of the power of restoration, is forcibly illustrated by Judge COFER, of the Kentucky Court of Appeals, in his able dissenting opinion in *Douglas, etc.*, v. *Cline. etc.*, 12 Bush, at pages 658 and 672; to which opinion we invite the attention of this Tribunal.

6. In *Dennison et al.* v. *C. A. & St. L. R. R. Co.*, 4 Bissell, 414, the same doctrine is held and forcibly illustrated.

7. The decree below, from which this appeal is taken, directs appellee's claim to be paid out of moneys in the registry of the Court, "*arising from the sale of the rail-*" *road property and assets covered by the mortgage or deed* "*of trust.*" (Record, folio 15.)

The first two points stated in the certificate of division, present the question whether the Court below "had the "power to direct the payment out of the money in the "registry of the Court, or that might thereafter be paid "into the registry of the Court, *arising from the sale of* "*the property* covered by the mortgage or deed of trust, "of claims for labor, similar to those stated in the petition "in this case, in preference to the claim arising from the "mortgage or deed of trust to the complainant," etc. (Record, folios 10, 11.)

We submit that there is no such power under the facts proven in the present case.

8. The mortgage in this case was given "for the pur-" pose of procuring the means necessary to construct and "equip" the railroad of the mortgagor. [Rec., No. 1152, folio 40.]

The railroad was built with the money realized from the bonds secured by the mortgage, and the bondholders, therefore, have a higher equity than that of ordinary mortgage creditors.

The decree below cannot be sustained upon any basis other than of pushing aside the mortgage contract, and "giving priority to the last creditor for aiding to conserve "the thing," on the principle favored in maratime law, which this court has determined cannot be done.

Galveston R. R. v. *Cowdrey*, 11 Wall., 482.

In that case Pulsford had a fourth mortgage for money advanced by him, which, with the iron laid on the road, (upon which iron he had a specific lien before it was laid,) completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien, because his means "applied to the road, saved "it, and rendered it capable of being used, which it would "not have been otherwise;" [*Ibid.*, 464, 465]; and because when the first three mortgages were executed that portion of the road "was not in existence, and could not have "been conveyed thereby, and can only be embraced "therein on a principle of equitable estoppel, which is re-"butted when it comes in conflict with a superior equity." *Ibid.*, 480.

Notwithstanding these facts, this Court repudiated the claim, Mr. Justice BRADLEY delivering a very lucid and forcible opinion, which emphatically enunciates and vindicates the superior equities of prior contract obligations, for which we now contend.—*Ibid.*, 481–2.

In our view, the equities of Pulsford were far superior to those of appellee in the case at bar. All there was of the five miles of railroad, upon which he sought a lien,

was created by means of his money, and yet the prior mortgages took it all. Appellee's claim at bar receives its only vitality, in the present controversy, because of its relation to what was done in the way of "aiding to con-"serve" the mortgaged property.

9. No Statutory Lien. There was no statute of Illinois in force at the time the mortgage in question was given and recorded, nor until some months thereafter, giving any lien upon a railroad for materials or supplies furnished. The mortgage was "recorded before the 1st day of February, A. D. 1872." [Record, folio 4.]

On July 1st, 1872, an act of the legislature of Illinois, passed April 3d of that year, went into effect, by which a lien was given on certain conditions, and under certain limitations, to contractors, laborers, etc., for their claims against railroad companies for labor and materials furnished. R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.

There is no pretence, nor can there be, of any claim, in the case at bar, arising under the statute.

III.

Net Earnings during the Receivership.

The net earnings of the road during the receivership "were applied from time to time, *by order of the Court*, "for the preservation of the property, and, with the con-"sent of the complainant" below, "in purchasing addi-"tional grounds and rolling stock, etc., and in making "permanent repairs or improvements upon said railroad "property, instead of discharging therewith the claims

"against said Railroad Company for labor, materials and "supplies." [Rec., folio 8.]

Opposing counsel contended below, and will doubtless do so here, that this was a diversion of the funds which ought to have been applied for the payment of the claims for labor and supplies furnished the Railroad Company within six months prior to the appointment of the receiver.

This claim is based upon the idea that the income of the receivership was a fund in the control of the Court, to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of that officer, of amounts due from the Railroad Company for labor and supplies within the preceding six months, which direction was not followed, therefore there was such a diversion of that income as requires restoration to be made out of the proeeeds of the sale of the mortgaged property.

1. This does not follow. Even if the provision in the decree appointing the receiver, requiring the six months' claims to be paid, was within the range of a "*sound* "*judicial* discretion," (which we insist it was not), still, that order was only an *interlocutory* one, and was subject to modification by the Court below, which was done by subsequent "orders of the Court for the preservation of the "property," etc., as stated. [Rec., folio 8.]

All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under "the control of the court."

Fourniquet et al. v. *Perkins*, 16 How., 82, 86.

Therefore, the provision for the payment of the six months' claims inserted by the Court below, " of its own " motion," in the decree appointing the receiver, having been afterwards, in the progress of the cause, *modified* by that Court, the case, as it now stands, must be treated the same as if no such provision had been inserted in that decree.

2. Secondly; the net income of the road earned during the receivership belonged to the beneficiaries under the mortgage, and could not lawfully be diverted therefrom for the payment of any general or unsecured claims of the Railroad Company, unless there had been a previous diversion from the gross income of the Company in favor of the mortgaged creditors, as held in *Fosdick* v. *Schall.*

" The income out of which the mortgage is to be paid " is the net income obtained by deducting from the gross " earnings what is required for necessary operating and " managing expenses, proper equipment and useful im- " provements."

Fosdick v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, " *priama facie belongs to the mortgage credit-* " *ors*, and the presumption which thus arises " must be overcome before they can be deprived of it. *Ibid.*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion say, say that:

" In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver

appointed, and deliver possession to him. *In either case the income would thereafter be theirs.*"

Ibid., 800.

See also, to the same effect,

Gillman et al. v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

See also,

S. E. A. Ins. Co. v. *Stebbins*, 8th Paige's Ch., 565.

Jones on R. R. Securities, § 114.

High on Receivers, § 643.

Jones on Mortgages, § 1536.

Ellis v. *B. H. & E. R. R. Co.*, 107 Mass., 1.

Hayes v. *Dickenson*, 9 Hun. (N. Y.), 277.

Post v. *Dorr*, 4 Edw. (N. Y.), Ch., 412.

Warner v. *Gouverneur's Ex'rs*, 1 Barb., 36.

Beverly v. *Scott et al.*, 4 Gratton, 208.

G. & C. U. R. R. Co. v. *Menzies*, 26 Ill., 121, 148.

M. V. & W. R'y Co. v. *U. S. Ex. Co.*, 81 Ill., 534–536.

IV.

ARGUMENT.

I.

NO DIVERSION PROVEN.

1. In the certificate of division it is stated that "the "only evidence offered or heard tending to show any di- "version by the Railroad Company from the current debt "fund or gross income of said Company to or for the "benefit of the mortgage bondholders" is "that *in the* "*year 1876* a payment of three thousand dollars ($3,000) "was made by the said Cairo and St. Louis Railroad "Company to the beneficiaries under the mortgage, *not* "to be applied on the bonded indebtedness, but which "was applied on account of the expenses of the bene- "ficiaries to a much larger amount in keeping an agency "in the United States, and in connection with the for- "bearance which they gave to the said Railroad Company "in respect to overdue interest." [Rec., folios 7, 8.] This statement is clearly sustained by the testimony of Mr. Smithers, which is given in full in the Souther & Bro. case; for which testimony see the Record in No. 1,152 of the present docket, at folio 140.

We submit that this does not establish that kind of a diversion from the current debt fund which will warrant any allowance of intervening claims for labor or supplies furnished the Railroad Company, even to the extent of three thousand dollars, ($3,000.) The money was not applied nor "to be applied on the bonded indebtedness." It was paid and applied toward the expense of "keeping

"an agency in the United States" in connection with the forbearance which the mortgage bondholders gave to the Railroad Company. The mortgage creditors got no benefit from the forbearance. This could have resulted only to the Railroad Company.

In the first and second points of division, stated by the Judges below, it will be observed that the Judges seem to hold that that there was a diversion to the extent of this three thousand dollars, ($3,000); but they expressly declare that there is *no evidence* in the record *showing any other diversion* "from the current earnings or income of the Rail-"road Company prior to the appointment of the receiver."

It follows, therefore, in our view of the law, that if any allowance whatever was authorized in the case below, it was only to the extent of the *pro rata* share which appellee's claim bears to the total amount of the claims pending in the Court below for labor and supplies furnished to the Railroad Company within the six months prior to the appointment of the receiver.

2. Secondly, it will be observed, that even if this payment can be regarded as a diversion at all, still it was not made "within the six months immediately preceding "the rendition of the decree appointing the receiver." The evidence and the statement in the certificate of division show that the three thousand dollar ($3,000) payment was made "*in the year 1876.*" [Rec., folio 7.] The bill to forclose the mortgage was filed and the receiver appointed on the *6th day of December, 1877.* [Rec., folios 4, 5.]

Thus it is rendered clear, beyond all dispute, that there was no diversion whatever by the Railroad Company for the benefit of the mortgage creditors within the time indicated by the decree appointing the receiver, inasmuch

as even the three thousand dollar ($3,000) payment is shown to have been made at least *eleven months* before such appointment, having been made sometime "in the "year 1876."

II.

THERE HAVING BEEN NO DIVERSION, THERE CAN BE NO RESTORATION. NO EQUITIES AGAINST THE MORTGAGE PRIORITY.

THE LAW.

1. In *Fosdick* v. *Schall*, 99 U. S., 251, this court has determined that "when a court of chancery is "asked by "railroad mortgagees to appoint a receiver of railroad "property, pending proceedings for foreclosure, the court, "in the exercise of a sound judicial discretion, may, as a "condition of issuing the necessary order, impose such "terms in reference to the payment, from the income dur- "ing the receivership, of such outstanding debts for labor, "supplies, equipment or permanent improvement of the "mortgaged property as may, under the circumstances of "the particular case, appear to be reasonable,"

But this "discretion" is not left to the mere whim or caprice of the chancellor. It is a discretion regulated by law. The chancellor must exercise "a *sound judicial* dis- "cretion," and must "so mould his order, that, while "favoring one, injustice is not done to another." [*Idem*, 253.]

Now let us see upon what basis the chancellor may "impose such terms" as are thus indicated, and what is to be the test of "the exercise of a *sound judicial* discre- "tion" in the premises.

We are not left to the domain of speculative reasoning in this regard; for, in the case referred to, this Court has drawn a clear and distinct dividing line beyond which the chancellor's "discretion" may not rightfully pass. The Court say that:

"When the companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, *in order that bonded interest may be paid*, and a disastrous foreclosure postponed, if not altogether avoided. In this way *the daily and monthly earnings*, which ordinarily should go to pay the daily and monthly expenses, *are kept from those to whom they in equity belong and* USED TO PAY THE MORTGAGED DEBT. *The income out of which the mortgagee is to be paid is the net income*, obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly *agrees that the current debts*, made in the ordinary course of business, *shall be paid from the current receipts*, before he has any claim upon the income. IF, for convenience of the moment, SOMETHING IS TAKEN FROM WHAT MAY NOT IMPROPERLY BE CALLED THE CURRENT DEBT FUND, AND PUT INTO THAT WHICH BELONGS TO THE MORTGAGE CREDITORS, it is certainly not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order *that what is due from the earnings to the current debt* shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, *until possession of the mortgaged premises is actually taken*, or something equivalent done, the whole earnings belong to the company, and are subject to its control." [*Ibid.*, 252-3.]

"We think, also, that *if* no such order is made when the receiver is appointed, and *it appears in the progress of the cause* THAT THE BONDED INTEREST HAS BEEN PAID, *additional equipment provided, or lasting improvements made* OUT OF EARNINGS WHICH OUGHT IN EQUITY TO HAVE BEEN EMPLOYED TO KEEP DOWN DEBTS FOR LABOR, SUPPLIES AND THE LIKE, it is within the power of the courts to use the *income of the receivership* to discharge the obligations which, BUT FOR THE DIVERSION OF FUNDS, *would have been paid in the ordinary course of business.* This, *not* because the creditors to whom such debts are due, have in law a lien upon the mortgaged property or the income, but, because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; *and* IF THEY GIVE TO ONE CLASS OF CREDITORS THAT WHICH BELONGS TO ANOTHER, *the court may, upon an adjustment of accounts, so use the income which comes into its own hands, as if practicable to restore the parties to their original equitable rights.* While, ordinarily, this power is confined to the appropriation of the income of the receivership, and the proceeds of the monied assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the *court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipments.* In this way the value of the mortgaged property is not unfrequently materially increased.

"*Under such circumstances, it is easy to see that there may sometimes be a propriety in* PAYING BACK TO THE INCOME FROM THE PROCEEDS OF THE SALE WHAT IS THUS AGAIN DIVERTED FROM THE CURRENT DEBT FUND, IN ORDER TO INCREASE THE VALUE OF THE PROPERTY SOLD." [*Ibid.*, 253, 254.]

And again the Court say:

"The POWER *rests upon the fact that in the administration of the affairs of the company,* THE MORTGAGED

CREDITORS HAVE GOT POSSESSION OF THAT WHICH, IN EQUITY, BELONGED TO THE WHOLE OR A PART OF THE GENERAL CREDITORS. *Whatever is done, therefore, must be with a view to a* **restoration** *by the mortgage creditors of that which they have thus inequitably obtained.* **It follows that if there has been in reality no diversion, there can be no restoration, and that the amount of restoration should be made to depend upon the amount of diversion."** [*Ibid.*, 254.]

There is no mistaking what is meant by this opinion. Human language is incapable of expressing in clearer phrase the holding of this Court, that the chancellor has *no authority*, in appointing a receiver, or subsequently in the progress of the cause, to require debts of a railroad company for labor, supplies, etc., to be paid out of the receivership income, or out of the sale of the *corpus*, except to the extent that the current debt fund has been diverted by the company from the payment of such debts, and *paid to the mortgage creditors, or for equipment or permanent improvements that enhance their security.* It follows that if, in the merely interlocutory order appointing a receiver, the court, as in the case at bar, of its own motion, inadvisedly or erroneously directs that such debts shall be paid out of the receivership funds, the error will be corrected, by subsequent order, or on the final hearing of intervening claims.

This Court expressly holds, that "*the* POWER *rests*" upon the question of diversion, as indicated, and it follows that where no such diversion appears, there is *no* "*power*" in the chancellor to divert the net income during the receivership from the bondholders.

"*Prima facie*, that fund belongs to the mortgage cred- "itors, and the presumption that thus arises" must be overcome before they can be deprived of it. [*Fosdick* v. *Schall*,

supra, 255.] "The income out of which the mortgagee "is to be paid is the *net income* obtained by deducting from "the gross earnings what is required for necessary "operating and managing expenses, proper equipment, "and useful improvements." (*Ibid.*, 252.)

2. In this connection, we recall attention to the important fact that the Court below, in rendering the decree by which the receiver was appointed, "OF ITS OWN MO- "TION, inserted the clause" providing for the payment of claims for labor and supplies furnished the Railroad Company within the six months immediately preceding the rendition of such decree. [Rec., folio 5.] There having been nothing before the Court when that decree was rendered showing any diversion whatever, we submit that, under the ruling in *Fosdick* v. *Schall*, the Court had no *power*, nor was it "the exercise of a *sound judicial* discre- "tion," to thus order payment of such six months' claims, as a condition of the appointment of the receiver. And especially was it beyond the legitimate power of the Court below, on the final hearing of the intervening claim now at bar, to direct the payment of the same, when it appeared *affirmatively* that there had been *no diversion* from the current debt fund or gross income of the Railroad Company to or for the benefit of the mortgage bondholders, within the six months fixed by the decree appointing the receiver, nor at any other time, unless to the extent of the $3,000 paid in 1876, as stated, over eleven months before the receiver was appointed.

3. The doctrine of *Fosdick* v. *Schall* is considered and approved in *Coe* v. *N. J. Midland Railway Co.*, 31 N. J. Eq., 130, where it is likewise held that there can be no allowance from receivership funds for labor, supplies, etc., furnished a railroad company, unless the company, before the

receiver took possession, diverted money belonging to the current debt fund, for the benefit of the mortgage creditors.

4. The case of *Hale* v. *Frost*, 99 U. S., 389, does not antagonize *Fosdick* v. *Schall*, but, on the contrary, refers to that case as furnishing the basis of the decision rendered by this Court. The Union Car Spring Manufacturing Company, within two months prior to the appointment of the receiver, sold and delivered to the railway company certain car springs and spirals, "*which the re-*" *ceiver, after his appointment, continued to use*, and for "which nothing had been paid." Hale, Ayer & Co. also furnished certain supplies to the machinery department. Other materials were furnished "for construction pur-" poses." This Court refused to allow these latter, but ruled that payment should be made for the supplies "to "the machinery department," and for such supplies "only." [*Ibid.*, 392.]

These supplies "to the machine department," which the receiver used after his appointment, stand upon a different basis from the claim at bar. Even if put into the machinery before the receiver took possession, they still contributed to the *permanent* improvement, and enhanced the value of the road.

5. The philosophy of the ruling in *Fosdick* v. *Schall*, is conclusive. The net income only being pledged by the mortgage, if the bondholders have been paid or have received the benefit of that part of the gross income accrued within a reasonable and limited time before the receivership, which ought to have been applied to necessary repairs and operating expenses, it is but simple justice that what has been thus wronfully diverted should be

restored; but beyond this line no court can pass without trampling upon solemn contract obligations, held sacred through the ages, and subordinating secured indebtedness to that which is general and unsecured.

In commenting upon such injustice, Judge COFER, of the Kentucky Court of Appeals, in his dissenting opinion in *Douglas, etc.*, v. *Cline, etc.*, 12 Bush, 658, says:

"A decision producing, or that may produce, such a result seems to me to overturn the very foundation of contract rights, and virtually to destroy all securities in the form of liens upon property, and to convert an intended benefit attempted to be secured by solemn contract, of which the world had notice, into a positive disadvantage, and to make the lack of all attempt to provide a security by contract the very best possible security, through a supposed discretion of the chancellor.

"Such a conclusion is not the offspring of any recognized or even of an asserted principle of equity. No rules or principles are laid down as conducting to a result so anomalous. It is simply said that the chancellor has a discretion to appoint a receiver or not, when applied to for that purpose, and that in this instance there was no abuse of discretion in so modifying the order of appointment as to require him to pay out of the earnings of the mortgaged property debts due to persons having no contract, or legal or equitable lien on the fund, to the exclusion of those having a lien on the property producing it, and who, it is decided by the majority of the court, have *prima facie*, an equitable claim to the whole fund, and at whose instance the receiver was appointed to rescue it from an insolvent and unfaithful corporation.

"Rights depending upon the discretion of courts are not the most valuable. They can never be measured; their extent and value are unknown, and are incapable of being ascertained."

The same learned Judge, later in the opinion, adds:

"If these appellees have an equity to be paid out of the earnings in the receiver's hands for labour done

before his appointment, because they bestowed their labor on the road and thereby kept it up, why shall not the material men who furnished articles indispensable to the operating of the road be paid also? If the men who furnished necessary material are entitled to be paid, upon what principle of laws or morals shall the men who furnished money to make cash purchases be refused? And if all these are to be paid out of the earnings to the exclusion of the mortgagees, there will remain no debts to be paid but the mortgage debts, and these being postponed to all others it will result that the only persons not secured are those who alone had taken security for their debts." *Ibid.*, (12 Bush), 672.

6. In the foreclosure case of *Dennison et al.* v. *C., A. & St. L. R. R. Co.*, 4 Bissell, 414, intervening petitioners, who had furnished supplies to the railroad company before the receiver was appointed, claimed that they had an equitable lien upon the moneys under control of the court, arising from the sale of the property, and received from the earnings of the road. The distinguished Judge of the seventh circuit, in delivering the opinion of the court dismissing the petitions, remarks:

"Now what equitable lien had these petitioners on that fund? None. Why? Because those who had prior liens came in and swept it away, and more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on; but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a court of equity and cut off the prior lien which exists on the farm and prevent it from being paid. These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them because those with whom they have dealt cannot do so.

"Upon general principles I hold, what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all, except specific liens, and those, of course, have to be paid in their order."

7. It should be specially noted that the decree from which this appeal is taken directs that the clerk pay the petitioners (appellees) the amount of his intervening claim "out of any money now in the registry of this Court, in "this cause, arising from the sale of the railroad property "and assets covered by the mortgage or deed of trust "aforesaid, or if sufficient money is not now in such reg-"istry, then that he pay the aforesaid amount of said "claim to the petitioner out of any money arising from "such sale that may hereafter come into the registry of "the Court." [Rec., folio 15.]

It should likewise be noted that in the first two points stated in the certificate of division, the question is submitted whether the Court "had the power to direct the "payment out of the money in the registry of the Court, "or that might thereafter be paid into the registry of the "Court, arising from the sale of the property covered by "the mortgage or deed of trust, of claims for labor, sim-"ilar to those stated in the petition in this case, in prefer-"ence to the claim arising upon the mortgage or deed of "trust to the complainant in this case," etc. [Rec., folios 10, 11.]

The Court below, therefore, ordered appellees' claim to be paid not from earnings of the road during the receivership, but *from proceeds of the sale of the property and assets* embraced in the mortgage. This, we submit, was clearly erroneous.

8. As has been seen, the mortgage or deed of trust

in the case at bar was given "for the purpose of procur- "curing the means necessary to construct and equip" the railroad of the mortgagor. [Rec., No. 1,152, folio 40.]

The railroad was built with the money realized upon the bonds secured by the mortgage, and the bondholders, therefore, have a higher equity than that of ordinary mortgage creditors. In the face of these facts, the Court below (the opinion of the Circuit Judge prevailing) decreed that the proceeds of the sale of the mortgaged property, so far as necessary, be paid out of the registry for labor and supplies furnished the mortgagor within six months before the receiver was appointed, nothwithstanding there is no pretence of any diversion from the current debt fund to or for the benefit of the beneficiaries under the mortgage within that time, or at any other time, unless possibly to the extent of $3,000, in 1876, as heretofore explained.

We respectfully submit that this decree cannot be sustained upon any other basis than that of pushing aside the mortgage contract, and "giving priority to the last "creditor for aiding to conserve the thing," on the principle favored in maritime law, which this Court has expressly determined cannot be done.

Galveston Railroad v. *Cowdrey*, 11 Wallace, 482.

In that case Pulsford's money, secured by the fourth mortgage, completed and gave almost the entire value to the five miles of road upon which he asked the court to give him a first lien (and the iron laid thereon, before it was laid, having been, in a separate article, specially pledged as security to him), because his means "applied "to the road, saved it, and rendered it capable of being

"used, which it would not have been otherwise," [*Ibid.*, 464 and 465], and because when the first three mortgages were executed that portion of the road "was not in "existence, and could not have been conveyed thereby, "and can only be embraced therein on a principle of "equitable estoppel, which is rebutted when it comes in "conflict with a superior equity." [*Ibid.*, 480.]

This Court emphatically repudiated the claim thus asserted. Mr. Justice BRADLEY, in delivering the opinion, said:

"Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. * * * By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, *by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them.*" [*Ibid.*, 481 and 482.]

We make these citations not because they contain any new theories, but because they very forcibly enunciate propositions of law so old that "the memory of man "runneth not to the contrary," and because the philosophy of the opinion and decision is fatal to the theory which underlies the decree in the case at bar; by which decree

proceeds of the sale of the mortgaged property are directed to be paid to the full amount of an unsecured claim, some six years the junior of the indebtedness secured by the deed of trust, thereby "giving priority to the last "creditor for aiding to conserve the thing," contrary to the established rules of equity.

In our view, the equities of Pulsford in the *Cowdrey* case were far superior to those of appellees in the case at bar. All there was of the five miles of railroad, upon which he sought a lien, was created by means of his money, and yet the prior mortgages took it all. Appellees' claim at bar receives its only vitality in the present controversy, because of its relation to what was done in the way of "aiding to conserve" the mortgaged property.

Those who furnished labor or materials, in thus "aiding "to conserve" the property, did so with full knowledge of the mortgage recorded years before, and "consented to" the benefits resulting to the road from such labor and materials "being covered by the mortgage in question. "They acquired no lien which can displace" it. Their only reliance for compensation was upon the gross earnings of the road. They took their chances as to the sufficiency of such earnings. If these were diverted to the benefit of the mortgage creditors, then, and not otherwise, can restitution be enforced, as clearly demonstrated in *Fosdick* v. *Schall*.

9. No Statutory Lien.—Attention is called to the fact that the mortgage under consideration in this cause, executed October 2, 1871, was "recorded before the first "day of February, A. D., 1872, in the offices of the "recorders of the various counties in the State of Illinois,

"into or through which the line of the railroad was located "and afterwards constructed." [Rec., folio 4.]

On July 1st following, an act of the legislature of that state went into effect, which had been passed April 3rd, 1882, by which act a lien was given to "contractors, sub-"contractors and laborers" for "their claims against "railroad companies," under certain limitations and conditions. [R. S. 1874, p. 671; R. S. 1877, p. 639; R. S. 1881, p. 701.]

It will be observed, therefore, that the mortgage had been both executed and recorded before the act was passed, and at least five months before it went into effect; so that the statute can have no possible bearing in the present controversy. Nor is there any pretense that any steps whatever were taken under the statute in order to acquire a lien thereunder. These were essential in case the statutory provisions could be invoked at all.

III.

Net Earnings during the Receivership.

Opposing counsel contended below that because the net earnings of the road during the receivership "were ap-"plied from time to time, *by order of the Court*, for the pre-"servation of the property, and, with the consent of the "complainant" below, "in purchasing additional grounds "and rolling stock, etc., and in making permanent repairs "or improvements upon said railroad property, instead of "discharging therewith the claims against said Railroad "Company for labor, materials, and supplies," [Record, follo 8]; because this was done, opposing counsel contended below, and will doubtless urge here, that the bond-

holders got the benefit of earnings which should have been applied to discharge indebtedness incurred by the Railroad Company for labor and supplies, and hence that restoration should be made out of the proceeds of the sale. The position urged was, and doubtless will be here, that the net income of the road during the receivership was a fund in the control of the Court to be applied for the benefit of all parties concerned, and that because, in the order appointing the receiver, direction was given for the payment, out of the net income of the receivership, of amounts due by the Railroad Company for labor and supplies furnished to the Company within the preceding six months, which direction was not followed, but such income was used otherwise as stated, therefore there was such a diversion of that income as requires restoration to be made out of the proceeds derived from the sale of the *corpus*.

1. This position is a *non sequitur*. Even if it be urged that the direction for the payment of the Railroad Company's indebtedness for labor and supplies, as contained in the order appointing the receiver, was the exercise of a "*sound judicial* discretion," (which we insist it was not, without proof of diversion of the gross income by the Railroad Company to or for the benefit of the mortgage creditors), still, that order was merely an *interlocutory* one, and was subject to modification by the Court below, in the exercise of a like "sound judicial discretion"; and this Court will notice that the disposition that was made of the net income of the receivership, was so made "*by order*" *of the Court below*, expressly given for that purpose. [Rec., folio 8.]

The Court below, having discovered that its order for payment of claims against the Railroad Company for labor and supplies, as contained in the decree appointing the

receiver, was unjust, *rightfully modified* the same by subsequent orders directing the application of the net income earned during the receivership "for the preservation of "the property," "and in making permanent repairs or "improvements," etc. That the Court had authority thus to modify the interlocutory decree, by which the receiver was appointed, there can be no manner of question. All interlocutory orders in a chancery proceeding, so far as not executed, are "open for revision, and under control of "the court."

Fourniquet et al. v. *Perkins*, 16 Howard, 82, 86.

The claim of appellees therefore, gains no support whatever from the provision referred to in the order appointing the receiver, in any view that can be taken of the same; for that provision was not permitted to stand, and under the circumstances, must be treated as though no such provision had been incorporated into the decree.

2. We answer, secondly, that the net income of the road, earned during the receivership, belongs to the beneficiaries under the mortgage; and it was not in the power of the Court below to divert the same, or any part thereof, to the payment of any of the general or unsecured indebtedness of the Railroad Company, unless there had been a previous diversion from the gross income of the Railroad Company, within a reasonable or limited time, in favor of the beneficiaries under the mortgage; in which case restoration could be made from the net income of the receivership, as held in *Fosdick* v. *Schall.*

A railroad company, so long as suffered to remain in possession of its property, is generally entitled to the income, rents and profits, of the road, and may contract for

labor and supplies needed in operating and maintaining the property, and creditors furnishing such labor and supplies may attach the tolls due from other corporations; but whenever possession is taken by the mortgagee, through a receiver or otherwise, from that time the beneficiaries under the mortgage are entitled to the earnings of the property. Even before such possession is taken, the mortgagee, when the income is covered by the deed of trust, as in the case at bar, is entitled to the net income of the property. "The income out of which the mort-"gage is to be paid is the net income obtained by deduct-"ing from the gross earnings what is required for neces-"sary operating and managing expenses, proper equip-"ment and useful improvements." *Fosdick* v. *Schall*, 99 U. S., 252.

The net income earned during the receivership, as before suggested, "*prima facie belongs to the mortgage* "*creditors*, and the presumption which thus arises" must be overcome before they can be deprived of it. *Fosdick* v. *Schall*, *supra*, 255.

In *American Bridge Company* v. *Heidelbach*, 94 U. S., 797, a mortgage was given upon the income, rents, issues and profits, as in the present cause. This Court, in the opinion, say that: "In this case, upon the default "which occurred, the mortgagees had the option to take "personal possession of the mortgaged premises, or to "file a bill, have a receiver appointed, and possession de-"livered to him. In either case *the income would there-*"*after have been theirs.*" *Ibid.*, 800.

See also, to the same effect, *Gillman et al.* v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603, 617.

And see also *S. E. A. Ins. Co.* v. *Stebbins*, 8th Paige's

Ch., 565; Jones on R. R. Securities, § 114; High on Receivers, § 643; Jones on Mortgages, § 1536; *Ellis* v. *B. H. & E. R. R. Co.*, 107 Mass., 1; *Hayes* v. *Dickenson*, 9 Hun, (N. Y.), 277; *Post* v. *Dorr*, 4 Edw., (N. Y.), Ch., 412; *Warner* v. *Gouverneur's Ex'rs*, 1 Barb., 36; *Beverly* v. *Scott et al.*, 4 Grattan, 208; *G. & C. U. R. R. Co.* v. *Menzies*, 26 Ill., 121, 148; *M. V. & W. R'y Co.* v. *U. S. Ex. Co.*, 81 Ill., 534, 536.

Respectfully submitted.

S. CORNING JUDD,
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